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A SELECTION
OF
LEADING CASES
ON

VARIOUS BRANCHES OF THE LAW:

With Notes.

BY JOHN WILLIAM SMITH,
ESQUIRE, OF THE INNER TEMPLE, BARRISTER-AT-LAW.

THE THIRD AND FOURTH EDITIONS BY
JAMES SHAW WILLES,
AND
HENRY SINGER KEATING,
OF THE INNER TEMPLE, ESQUIRES, BARRISTERS-AT-LAW,
(NOW JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS.)

THE SIXTH EDITION
BY
FREDERIC PHILIP MAUDE,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW,
AND
THOMAS EDWARD CHITTY,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW,
THE CLERK OF ASSIZE FOR THE WESTERN CIRCUIT.

"It is ever good to rely upon the book at large ; for many times, Compendia sunt dispendia, and Melius est petere fontes quam sectari rivulos."—1 INST. 305 b.

IN TWO VOLUMES.

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TO

THE RIGHT HONOURABLE

JAMES, BARON WENSLEYDALE,

This Edition is Inscribed,

WITH SINCERE RESPECT.

ADVERTISEMENT TO THE SIXTH EDITION.

THE additions and alterations made by the Editors of the fifth and present Editions are separated from the rest of the work by brackets; the marks which distinguished the notes of the former Editors being omitted.

In the fifth Edition the Indexes were re-written and enlarged, and the Index to the Text was blended with that to the Notes. In the present Edition, the Index to the first Volume has been much altered, and again greatly enlarged.

The Editors have received from Mr. Justice Willes very great assistance in the preparation of the whole of this Edition: and they desire to express their great obligation for this to that learned Judge.

Readers are requested to make the additions mentioned at the end of the Table of Cases in the first Volume.

F. P. M.

T. E. C.

INNER TEMPLE,
April, 1867.

PREFACE TO THE SECOND EDITION.

BY THE AUTHOR.

WHEN this work was first published, it was hoped that it would be found to supply, in some degree, a want which was believed to have been felt, although on different occasions, both by the student and the lawyer occupied in actual practice.

The student, when he devotes himself to the perusal of Law, is frequently advised by experienced friends, that he ought early to habituate himself to the perusal of Reports at large, instead of pinning his faith upon the commentaries and abridgments of the treatise writers—“*Melius est,*” says Lord Coke, “*petere fontes quam sectari rivulos.*”—When, however, he attempts to follow this advice, he finds himself astray amid the masses of accumulated lore which the Reports present to him, the “*aliarum super alias acervatarum legum cumuli:*” he feels his judgment perplexed, his choice distracted, and his immediate wish is, that some guide would direct

him to the *leading* cases, embodied in which he might discover those great principles of Law of which it is necessary that he should render himself thorough master before he can trace with accuracy the numerous ramifications into which those principles are expanded in the surrounding multitude of decisions.

The lawyer engaged in actual business frequently also feels the want of a portable collection of leading cases, but for a different reason. The leading cases are those with the names of which he is most familiar, which he has most frequently occasion to consult, and which, consequently, he would, if it were practicable, willingly carry into court or round the circuit with him.

It was therefore thought that this collection might prove of some utility to both the classes of Readers just described. The cases it contains may all, it is believed, be properly denominated "*leading cases*." Each involves, and is usually cited to establish, some point or principle of real practical importance. In order that the consequences of each may be understood, and its authority estimated as easily as possible, notes have been subjoined, in which are collected subsequent decisions bearing on the points reported in the text, and in which doctrines having some obvious connexion with them are occasionally discussed. This, though of course the least

valuable part of the work, has cost its author by far the greatest labour and anxiety; care has been taken in executing it not to allow the notes to digress so far from the subject-matter of the text, as to distract the reader's mind from that to which they ought to be subsidiary. In perusing them, it will be found that the facts of some of the cases cited are set forth at considerable length, and portions of the judgments transcribed *verbatim*. This is done only when the case cited is itself of such importance as to merit the appellation of a *leading case*, with an abridgment of which the reader is thus furnished, where it could not, consistently with the plan of the work, be presented to him entire. As to the references in the margin, they are in some instances taken from previous editions of the same case; for others, the present editor is responsible: the former are connected with the text by letters, the latter by the sign †.

In this second edition, the paging of the former one has been preserved.* This has been done because some gentlemen had, in works of much greater value, done this the honour of referring to it; and it was thought desirable that those references should be applicable to

* [In consequence of the enlargement of the original work in subsequent editions, this mode of paging became inconvenient and perplexing, and was discontinued. The fourth, fifth, and present editions are paged in the ordinary manner.]

this edition as well as the former. The place where a page in the former edition terminated and a new one commenced, is shown by the sign * in the text, and the corresponding sign * at the top of the page. Thus the first page of the former edition terminated at the word *resolved*, and the second page began with the figure 1, at which there is now an * in the second page of this edition.

J. W. S.

12, KING'S BENCH WALK,
Feb. 23, 1841.

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York, &c., Rail. Co. <i>v.</i> Crisp, 207	Zouch <i>v.</i> Clay, 833
Yorkshire Tire, &c. <i>v.</i> Rotherman, 697	Zwinger <i>v.</i> Samuda, 477
Youde <i>v.</i> Yonde, 655	

ADDENDA.



- Page 15, line 38, col. 2,
Insert *Shears v. Jacob*, 1 Law R. C. P. 513.
- „ 196, line 9, col. 2.
Insert *Grill v. General Iron Screw Collier Co.*, 1 Law. R.
C. P. 600 ; *S. C.*, 35 L. J. C. P. 321.
- „ 289, line 22, col. 1,
Insert *Wilkinson v. Evans*, 35 L. J. C. P. 224.
- „ 378, line 24, col. 2,
Insert *Hornby v. Close*, 2 Law R. Q. B. 153.

TWYNE'S CASE.

MICH. 44 ELIZ.—IN THE STAR CHAMBER.

[REPORTED 3 COKE 80.]

*What transactions are fraudulent within St. 13 Eliz.
c. 5, and 27 Eliz. c. 4.*

IN an information by Coke, the Queen's Attorney-General, against Twyne of Hampshire, in the Star-Chamber, for making and publishing of a fraudulent gift of goods. The case on the stat. of 13 Eliz. c. 5, was such: Pierce was indebted to Twyne in 400*l*., and was indebted also to C. in 200*l*. C. brought an action of debt against Pierce, and pending the writ, Pierce, being possessed of goods and chattels of the value of 300*l*., in secret made a general deed of gift of all his goods and chattels, real and personal whatsoever, to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shorn the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *feri facias* directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift, on the whole matter, was fraudulent and of no effect by the said act of (a) 13 Eliz. or not, was the

Moor 633.
Lane 44, 45, 47.
Co. Lit. 3. b.
76. a. 290. a.
3 Keb. 259.
See the stat.
27 Eliz. cap. 4.
(a) 5 Co. 60. a.
b. 6 Co. 18. b.
10 Co. 56. b.
3 Inst. 152.
Co. Lit. 3. b.
76. a. 290. a. b.
13 El. c. 5.
2 Leon. 8, 9, 47,
223, 308, 309.
3 Leon. 57.
Latch. 222.
2 Rol. Rep. 493.
Palm. 415.
Cr. El. 233,
234, 645, 810.
Cro. Jac. 270,
271. Dy. 295,
pl. 17, 351, pl.
23. 2 Bulst.
226. Rastal,
Entries, 207. b.
Lane 47, 103.
Hob. 72, 166.
Moor 638.
Doct. pla. 200.
Yelv. 196, 197.
1 Brownl. 111.
Co. Ent. 162.

question. And it was resolved by Sir Thomas Egerton, Lord Keeper of the Great Seal, and by the Chief Justice Popham and Anderson, and the whole court of Star-Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved :

(a) Godb. 398. 1. That this gift had the signs and marks of fraud, because the gift is general, without exception of his (a) apparel, or of anything of necessity ; for it is commonly said, *quod (b) dolosus versatur in generalibus*.

(b) 2 Bulstr. 226. 2 Co. 34. a. 1 Roll. Rep. 157. Moor. 321. 2. The donor continued in possession, and used them as his own ; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, *et dona clandestina sunt semper suspiciosa*.

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

6. The deed contains, that the gift was made honestly, truly, and *bonâ fide* ; *et clausulæ inconsuetæ semper inducunt suspicionem*.

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it was provided, that the said act shall not extend to any estate or interest in the lands, &c., goods or chattels, made on a good consideration and *bonâ fide* ; for, although it is on a true and good consideration, yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide* within the said proviso which is accompanied with any trust. As if a man be indebted to five several persons in the several sums of 20*l.* and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, but there

(c) Goldsb 161. is a trust between them, that the donee shall deal (c) favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his

benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bond fide* within the said proviso; for the proviso saith on a good consideration, and *bond fide*; so a good consideration does not suffice, if it be not also *bond fide*. And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also:—1. Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gift, take the possession of them: for continuance of the possession in the donor is the sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bond fide*, do not extend to every gift made *bond fide*; and, therefore, there are two manner of gifts on a good consideration, *scil.* consideration of nature of blood, and a valuable consideration. As to the first in the case before put; if Cr. Jac. 127. he who is indebted to five several persons, to each party Palm. 214. in 20*l.*, in consideration of natural affection gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c., which are things of value, the intent of the act was, that the consideration in such cases should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors; and if consideration of nature of blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to the gifts made *bond fide*, it is to be known, that every gift made *bond fide*, either is on a trust between the parties, or without any trust; every gift made on

a trust is out of this proviso ; for that which is betwixt the donor and donee, called (a) a trust *per nomen speciosum*, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed or implied ; an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed : a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only ; and therefore, if a man, before the statute of 27 H. 8, had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee : and afterwards the bargainor, without a consideration, enfeoffed others (b), who had no notice of the said bargain ; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee ; so in the same case, if the feoffees, in consideration of nature or blood, and without a valuable consideration, enfeoffed their sons, or any of their blood, who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration ; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration, but shall toll an use raised on consideration of nature, for both considerations are *in æquali jure*, and of one and the same nature.

(a) 6 Co. 72. b.
(b) See Stat. 1
Rich. 3, cap. 1,
and Sanders on
Uses, 4th Ed.
p. 23. 2 Roll.
779.

2 Roll. 779.

33 H. 6. 16.
7 Co. 39. b.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.*, that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him, *vide* 33 H. 6. 33. by Prisot, if the father enfeoffs his son and heir apparent within age, *bonâ fide*, yet the lord shall have the wardship of him : so note, valuable consideration is a good consideration within this proviso ; and a gift made *bonâ fide* is a gift made without any trust either expressed or implied : by which it appears, that as a gift made on a good consideration, if it be not also

bonâ fide, is not within the proviso; so a gift made *bonâ fide*, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bonâ fide*.

To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

Quæritur, ut crescent tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, *it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud.* Note, reader, according to their opinions, divers resolutions have been made.

Between Pauncefoot and Blunt, in the Exchequer-Chamber, Mich. 35 & 36 Eliz., the case was: Pauncefoot being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, coloured with feigned consideration and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment: and whether this gift should be void to defeat the Queen of her forfeiture, either by the common law, or by any statute, was the question.* And some conceived that the common law, which (a) abhors all fraud, would make void this gift as to the Queen, *vide* Mich. 12 & 12 Eliz.; Dyer (b) 295; 4 & 5 P. & M. 160. And the statute of (c) 50 E. 3, c. 6, was considered: but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, and other privileged places; but some conceived that the stat. of (d) 3 H. 7. c. 4, extends to this case. For although the preamble speaks only of creditors, yet it is provided by the body of the act generally, that all gifts of goods and chattels made or to be made on trust

Lane 44, 45.
Pauncefoot's
Case.

* [Conveyance after commission of felony and before conviction valid, if for good consideration, *bonâ fide*, and not for the purpose of evading forfeiture, *Chowne v.*

(a) 3 Co. 78. a.
(b) 3 Co. 78. a. b.
Dyer 295, pl. 351; *S. C.* 31 L. J. Cha. 757].

(c) 3 Co. 78. a.
(b) 3 Co. 78. a. b.
Dyer 295, pl. 351; *S. C.* 31 L. J. Cha. 757].

(d) Cro. El. 291, 292.
Lane 45.

to the use of the donor, shall be void and of no effect, but that is to be intended as to all strangers who are to take prejudice by such gift, but between the parties themselves it stands good. But it was resolved by all the barons, that the stat. 13 Eliz. c. 5 (a), extends to it; for thereby it is enacted and declared, that all feoffments, gifts, grants, &c., "to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs," shall be void, &c. So that *this act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.*

And it was resolved, that this word forfeiture should not be intended only of a forfeiture of an obligation, recognizance, or such like, (as it was objected by some, that it should, in respect that it comes after damage and penalty), but also to everything which shall by law be forfeit to the king or subject. And therefore, if a man, to prevent a forfeiture for felony, or by outlawry, makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are (b) forfeited, notwithstanding this gift, the same law of recusants, and so the statute is expounded beneficially to suppress fraud.

Note well this word (c) (declare) in the act of 13 Eliz., by which the parliament expounded that this was the (d) common law before. And according to this resolution it was decreed, Hil. 36 Eliz., in the Exchequer-Chamber.

Mich. 42 & 43 Eliz. in the Common Pleas, on evidence to a jury, between Standen (e) and Bullock, these points were resolved by the whole court on the statute of 27 Eliz. c. 4. Walmsley, J., said, that Sir Christ. Wray, late C. J. of England, reported to him, that he and all his companions of the King's Bench were resolved, and so directed a jury on evidence before them; that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers other of his blood, with a future power of revocation, as after such feast, or after the death of such one; and afterwards, and before the

(a) Co. Lit. 3. b.
76. a. 290. a. b.
3 Inst. 152.
5 Co. 60. a. b.
6 Co. 18. b.
10 Co. 56. b.
Co. Ent. 162. a.
1 Leon. 47.
308, 309. 2
Leon. 8, 9, 223.
3 Leon. 57.
Latch. 222. 2
Roll. Rep. 493.
Palm. 415.
Cr. El. 233,
234, 645, 810.
Cr. Jac. 270.
2 Bulst. 226.
Hob. 72, 166.
Yelv. 196, 197.
1 Brownl. 11.
Dyer 295, pl.
17, 351, pl. 23.
Rastal, Fraudulent Deeds.
1 Rast. Ent.
207. b. Lane 47,
103. Moor 638.
Doct. pl. 200.
(b) Co. Lit.
250. b.

(c) Co. Lit. 76.
a. 290. b.

(d) Hard. 397.
Standen and
Bullock's Case.

(e) Moor 605,
615.
Bridgm. 23.
5 Co. 60. b.
Palm. 217.
Lane 22.
2 Jones 95.

power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs; this bargain and sale is within the (a) remedy of the said (a) 1 Sid. 133. stat. For although the stat. saith, "the said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes *in esse*; yet it was held that the intent of the act was, that such voluntary conveyance which was originally subject to a power of revocation, be it *in presenti* or *in futuro*, should not stand against a purchaser *bond fide* for a valuable consideration; and if other construction should be made, the said act would serve for little or no purpose, and it would be no difficult matter to evade it: so if A. had reserved to himself a power of revocation with the assent of B., and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said act; for otherwise the good provision of the act, by a small addition, and evil invention, would be defeated (b).

And on the same reason it was adjudged, 38 Eliz., in the Common Pleas, between Lee and his wife executrix of one Smith plaintiff, and Mary (c) Colshil, executrix of Thos. Colshil, defendant in debt on an obligation of 1000 marks, Rot. 1707. The case was, Colshil, the testator, had the office of the Queen's customer, by letters patent, to him and his deputies; and by indenture between him and Smith, the testator of the plaintiff, and for 600*l.* paid, and 100*l.* *per ann.* to be paid during the life of Colshil, made a deputation of the said office to Smith; and Colshil covenanted with Smith, that if Colshil should die before him, that then his executors should pay him 300*l.* And divers covenants were in the said indenture concerning the said office, and the enjoying of it; and Colshil was bound to the said Smith in the said obligation to perform the covenants; and the breach was alleged in the non-payment of the 300*l.*, forasmuch as Smith survived Colshil; and although the said covenant to repay the

(b) Sed vide 2
Show. 46, post
in notis.

(c) 2 And. 55,
107.
Godb. 210.
Cro. El. 529.
Moor 857.
Ley 2, 75, 79.

(a) Style 29.
Cro. El. 520.
Cro. Jac. 269.
Hob. 75.
Co. Lit. 234. a.
12 Co. 78.
8 Inst. 148, 154.
3 Keb. 26, 659,
660, 717, 718.
1 Brownl. 70,
71. 2 And.
55, 107.
3 Bulst. 91.
3 Leon. 33.
1 Rol. Rep.
157, 256.
Goldsb. 180.
(b) 2 And. 56,
57, 108.
1 Mod. Rep. 35,
36. Hob. 14.
11 Co. 27. b.
2 Rolfe's 28.
Co. Lit. 224. a.
2 Jones 90, 91.
Cro. El. 529,
530. Cro. Car.
338. Godb.
212, 213.
1 Brownl. 64.
Plowd. 68. b.
Moor 856, 857.
Ley 75, 79.
(c) 1 Co. 112. b.
174. a.
Co. Lit. 237. a.
Hob. 337, 338.
Moor 605.
2 Rol. Rep. 337,
496. Winch. 65.
(d) Co. Ent.
676. b. 19.
Cro. El. 444,
445. Lane 45.
Upton and Bas-
set's Case.

(e) Plow. 46. b.
55. a.
Fitz. Replie. 15.
Br. Trespass. 26.
Br. Collusion 4.
Br. Property 6.
2 Inst. 713.
14 H. 8. 8. b.
33 H. 6. 5. a. b.
[Barton v.
Vanheythuyssen,
11 Hare, 126.]

300*l.* was lawful, yet, forasmuch as the rest of the cove-
nants were against the statute of (a) 5 E. 6, cap. 16, and if
the addition of a lawful covenant should make the obliga-
tion of force as to that (b), the statute would serve for
little or no purpose; for this cause it was adjudged, that
the obligation was utterly void.

2nd, It was resolved that if a man hath power of revoca-
tion, and afterwards to the intent to defraud a purchaser,
he levies a (c) fine, or makes a feoffment, or other convey-
ance to a stranger, by which he extinguishes his power,
and afterwards bargains and sells the lands to another for
a valuable consideration, the bargainee shall enjoy the
land, for as to him, the fine, feoffment, or other convey-
ances by which the condition was extinct, was void by the
said act; and so the first clause, by which all fraudulent
and covenous conveyances are made void as to purchasers,
extend to the last clause of the act, *scil.*, when he who
makes the bargain and sale had power of revocation. And
it was said that the statute of Eliz. hath made voluntary
estates made with power of revocation, as to purchasers, in
equal degree with conveyances made by fraud and covin
to defraud purchasers.

Between (d) Upton and Basset in trespass, Trin. 37
Eliz. in the Common Pleas, it was adjudged that if a man
makes a lease for years by fraud and covin, and afterwards
makes another lease *bond fide*, but without fine or rent,
reserved, that the second lease should not avoid the first
lease.

For first it was agreed, that by the common law an
estate made by fraud should be avoided only by him
who had a former right, title, interest, debt, or demand,
as by 33 H. 6, a sale in open (e) market by covin shall
not bar a right which is more ancient: nor a covenous
gift shall not defeat execution in respect of a former
debt, as it is agreed in 22 Ass. 72; but he who hath
right, title, interest, debt, or demand more puisne shall
not avoid a gift or estate precedent by fraud by the
common law.

2nd, *It was resolved, that no purchaser should avoid a*

precedent conveyance made by fraud and covin, but he who is a (a) purchaser for money or other valuable consideration; for although in the preamble it is said (for ^{(a) Cro. El. 415.} money or other good consideration), and likewise in the body of the act (for money, or other good consideration), yet these words (good consideration) are to be intended only of valuable consideration, and that appears by the clause which concerns those who had power of revocation, for there it is said, for money or other consideration paid or given, and this (paid) is to be referred to (money), and (given) is to be referred to (good consideration), so the sense is for money paid, or other good consideration given, which words exclude all consideration of nature or blood, or the like, and are to be intended only of valuable considerations which may be given; and therefore he who makes a purchase of land for a valuable consideration is only a purchaser within the statute, and this latter clause doth well expound these words (other good consideration), mentioned before in the preamble and body of the act.

And so it was resolved, *Pasch.* 32 Eliz. in a case referred ^{1 And. 233.} out of the Chancery to the consideration of Wyndham ^{Nedham and Beaumont's Case.} and Periam, Justices: between John Nedham, plaintiff, and Beaumont, Serjeant-at-law, defendant, where the case was, Hen. Babington seised in fee of the manor of Lit-Church, in the county of Derby, by indenture, 10th Feb. 8 Eliz. covenanted with the Lord Darcy, for the advancement of such heirs males, as well those he had begot, as those he should afterwards beget on the body of Mary then his wife (sister to the said Lord Darcy), before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Henry for his life, and afterwards to the use of the eldest issue male of the bodies of the said Henry and Mary, begotten in tail, &c., and so to three issues of their bodies, &c., with the remainder to his right heirs. And afterwards, 8 *Marri, ann.* 8 Eliz., Henry Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years to Robert Heys: and afterwards levied the fine accordingly: and on conference had

with the other Justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser in vulgar and common intendment: also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the statute of Eliz., for (a) a valuable consideration is only a good consideration within that act. In this case, Anderson, C. J. of the Common Pleas, said, that a man who was of small understanding, and not able to (b) govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards, he being seduced by deceitful and covenous persons, for a small sum of money bargained and sold his land, being of a great value: this bargain, although it was for money, was holden to be (c) out of this statute, for this act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully and without fraud or deceit: and such conveyance made on trust is void as to him who purchases the land for a valuable consideration *bond fide*, without deceit or cunning.

And by the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

STATUTE 13 Eliz. c. 5 (made perpetual by 29 Eliz. c. 5), after reciting that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of malice, fraud, covin, collusion, &c., to delay, hinder, or defraud creditors, or others of their just and lawful actions, suits, debts, accounts, damages, &c., proceeds to declare and enact that every feoffment, &c., of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution made for any intent and purpose before declared and expressed, shall be as against that person, his heirs, successors, executors, &c., whose actions, suits, &c., are or might

be in anywise disturbed, hindered, delayed, or defrauded, *utterly void*. By sect. 6, however, the act is not to extend to any estate or interest in lands, &c., on good consideration and *bond fide*, lawfully conveyed to any person, &c., not having notice of such covin, &c. This act was not by any means the first attempt of the legislature to foil covenantous transactions, for by 3 H. 7, c. 4, "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift" are declared "void and of none effect." And by the prior act of 50 Ed. 3, c. 6, after reciting "that divers persons do give their tenements and chattels to their friends by collusion to have the profits at their will and after do flee to the franchise of Westminster, of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with a high countenance of another man's goods, and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt and release the remnant, it is ordained and assented that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels as if no such gift had been made." Another statute containing provisions on the same subject, 2 R. 2, c. 3 [has been repealed by 26 & 27 Vict.

c. 125, with, amongst other qualifications, this somewhat enigmatical one, that the repeal of that and other acts is not to affect any "principle or rule," &c., "derived by, in, or from the repealed enactment"].

When it is attempted to invalidate a transfer of goods by showing it to fall within the provisions of 13 Eliz. c. 5, a question arises proper for the consideration of a jury, who are to say whether the transaction was *bond fide*, or a contrivance to defraud creditors. Where a bill of sale of chattel property is executed by a debtor to his creditor, purporting to convey the property to the vendee immediately, yet the vendor is after its execution suffered to remain in possession, a very strong presumption of fraud arises; for, as Lord Coke remarks in the principal case, continuance in possession by the donor is a sign of a trust for his benefit, and therefore in *Edwards v. Harben*, 2 T. R. 587, where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the meantime the debtor died, whereupon the creditor took and sold the goods, he was held liable to be sued as *executor de son tort* for the debts of the deceased. See *Shears v. Rogers*, 3 B. & Ad. 363. Indeed, in *Edwards v. Harben*, the court went so far as to say, "This has been argued as a case in which the want of pos-

session is only *evidence* of fraud, and that it was not such a circumstance, *per se*, as makes the transaction fraudulent in point of law. That is the point we have considered, and we are all of opinion that if there be *nothing but the absolute conveyance without the possession*, that, in point of law, is fraudulent." See also *Bamford v. Baron*, *ibid.* in notis; *Reid v. Blades*, 5 Taunt. 212; *Paget v. Perchard*, 1 Esp. 205; *Martin v. Perchard*, 2 W. Bl. 702. Nay, Lord Ellenborough thought that if the vendor remained in possession of the goods after the sale thereof, the case was not bettered by the vendee's remaining in possession along with him; and, therefore, in *Wordall v. Smith*, 1 Camp. 333, where an action was brought against the sheriff of Middlesex for a false return to a writ of *fiervi facias* sued out by the plaintiff against John Mason, and returned by the sheriff *nulla bona*, and upon the trial it appeared that Mason had, before the issuing of the *fi. fa.*, assigned all his effects to a creditor, whose servant was immediately put into the house, and remained conjointly with Mason, Lord Ellenborough directed a verdict for the plaintiff, saying, "To defeat the execution there must have been a *bond fide* substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent posses-

sion with the assignor is colourable; there must be an exclusive possession under the assignment, or it is fraudulent and void, as against creditors."

However, though in *Edwards v. Harben* it was laid down in the express terms above stated, that an absolute sale without delivery of possession was, in point of law, fraudulent, the tendency of the courts has lately been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of a transmutation of possession shall prevail. And, indeed, it ought to be remarked, that even in *Edwards v. Harben*, the words of Buller, J., were, "If there be *nothing but an absolute conveyance, without the possession*, that in point of law is fraudulent;" by which his lordship may have intended, that where there was *nothing, i. e.*, no facts whatever appearing in the case except the absolute conveyance and the non-delivery, that then the inference of fraud would be so strong, that a jury ought not to resist it. But it is very different in cases where, although the conveyance is absolute, and the possession has not passed, still there are surrounding circumstances which show that a fraud may not have been intended; in such cases it cannot properly be said, that there is "*nothing but an absolute conveyance without*

the possession." Therefore in *Latimer v. Batson*, 4 B. & C. 652, where the sheriff seized the goods of the Duke of Marlborough, and sold them to the judgment creditor, who sold them to the plaintiff, who put a man in possession but allowed them to remain in the duke's mansion and be used by him as before, it was held that it was properly left to the jury to say whether the sale was a *bona fide* sale for money paid by the plaintiff; and that, if so, they should find a verdict for him. Here the goods had been seized by the sheriff, who is a public officer, and his seizure a public act, so that the transaction was accompanied with some notoriety, and as the secrecy of the transfer is a badge of fraud (see the principal case, and *Mace v. Cammel*, Lofft. 782), so is the notoriety of the transfer always a strong circumstance to rebut the presumption thereof. See *Latimer v. Batson*; *Leonard v. Baker*, 1 M. & S. 251; *Watkins v. Birch*, 4 Taunt. 823; *Jezeph v. Ingram*, 8 Taunt. 838; *Kidd v. Rawlinson*, 2 B. & P. 59; *Cole v. Davies*, 1 Lord Raym. 724. [*Macdona v. Swiney*, 8 Ir. C. L. Rep. 73.]

It may, therefore, be safely laid down, that, under almost any circumstances, the question, *fraud or no fraud*, is one for the consideration of the jury. See the judgments in *Martindale v. Booth*, 3 B. & Ad. 498, where several cases establishing this point are cited;

and see in *Carr v. Burdiss*, 5 Tyrwh. 316, the expressions of Parke, B.; *Dewey v. Bayntun*, 6 East, 257; *Reed v. Blades*, 5 Taunt. 212; and per Tindal, C. J., *Lindon v. Sharp*, 6 Man. & Gr. 898; 7 Scott, N. R. 730, S. C. [*Pennell v. Dawson*, 18 C. B. 355; *Darvill v. Terry*, 6 H. & N. 807, S. C. 30 L. J. Exch. 254. In *Biddulph v. Gould*, Q. B., 22 June, 1863, an exaggeration in the bill of sale of the amount of the consideration given was held not to invalidate it, though the mistatement was intentional; the jury finding that it was made innocently, though the making it was unbusinesslike. So, in Chancery there are no rules establishing particular circumstances to be indelible badges of fraud; but the question of *bona fides* is there also one of fact; *Hale v. The Metropolitan Saloon Omnibus Co.*, 28 L. J. Cha. 777.]

The above observations apply to cases where the conveyance is *absolute*, and there is no transmutation of possession, but where the conveyance is not absolute to take effect immediately, as, for instance, where it is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, there, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud. "We consulted," says Buller, J., in *Edwards v.*

Harben, "with all the judges, who are unanimously of opinion, that unless possession *accompanies and follows the deed*, it is fraudulent and void; I lay stress on the words *accompanies and follows*, because I shall mention some cases where, though possession was not delivered at the time, the conveyance was held not to be fraudulent." And then his lordship proceeds to point out the distinction between "deeds, or bills of sale which are to take place *immediately*, and those which are to take place *at some future time*: for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as *accompanying and following* the deed." See *B. N. P.* 258, and *Cadogan v. Kennett*, *Cowp.* 436; *Minshull v. Lloyd*, 2 *M. & W.* 450. This doctrine was affirmed and acted upon in the case of *Martindale v. Booth*, 3 *B. & Ad.* 505, and in *Reed v. Wilmot*, 7 *Bing.* 577. See also per Tindal, C. J., *Reeves v. Capper*, 5 *Bing. N. C.* 140. Cases may, and probably will, arise in which it may be attempted to take advantage of this doctrine for the purposes of fraud, by introducing terms consistent with the continuing possession of the vendor into deeds really intended not to operate as a *bond fide* transfer of property, but to enure for the vendee's protection. In such

a case, however, the collusion, as soon as discovered, would be held to invalidate the deed as much as if the conveyance purported upon the face of it to be absolute, for the presence or absence of fraud depends on the motives of the party making the conveyance. See *Nunn v. Wilson*, 8 *T. R.* 521; per Le Blanc, J., *Riches v. Evans*, 9 *C. & P.* 640.

[Thus, in cases of secret transfer not impeachable on the ground of fraud, or want of consideration, the 13 Eliz. c. 5, left the creditor liable to incur a loss by trusting to the false appearance of ownership which the debtor's continuance in possession presented. In the events of bankruptcy and insolvency this defect in the law has been remedied by later statutes, which vest in the assignees, upon order of the court, all goods which by consent and permission of the true owner are in the debtor's possession, order, or disposition at the time of his bankruptcy or arrest, and of which he was then the reputed owner, 12 & 13 Vict. c. 106, s. 125; 1 & 2 Vict. c. 110, s. 57; see *Heslop v. Baker*, 8 *Exch.* 411; *Quatermaine v. Bittleston*, 13 *C. B.* 133; *Hamilton v. Bell*, 10 *Exch.* 545; *Spackman v. Miller*, 12 *C. B. N. S.* 659; and *Reynolds v. Hall*, 4 *H. & N.* 519. But in general the secrecy of the transfer was not absolutely fatal to its validity, until the 17 & 18 Vict. c. 36, "An act for preventing frauds upon creditors by secret

bills of sale of personal chattels." The provisions of this important enactment extend to all bills of sale made after the passing of the act (that is to say, after the 10th of July, 1854), whether they be absolute or conditional, or subject or not subject to any trusts, and which empower the grantee to seize or take possession, either with or without notice, immediately or at a future time, of any property or effects comprised in the bill. See s. 1. Under the term "bill of sale," this act includes "assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels; and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt." See s. 7. But it does not extend to assignments for the benefit of creditors (*General Furnishing, &c., Co. v. Venn*, 2 H. & C. 153; S. C. 32 L. J. Exch. 220), marriage settlements (*Foster v. Fowler*, 28 L. J. Q. B. 210), transfers of ships, transfers of goods in the ordinary course of business of any trade or calling, or bills of sale of goods in foreign parts or at sea, bills of lading, delivery orders, or any other documents used in the ordinary course of business as proof of the possession or control of goods. See s. 7; and *Allsop v. Day*, 7 H. & N. 457. Under the term "personal chattels" the statute comprehends goods, furniture, fixtures (see

876), and other articles capable of complete transfer by delivery (see *Sheridan v. McCartney*, 12 Ir. C. L. Rep. 506); but not chattel interests in real estate or shares in government securities, or in incorporated or joint-stock companies, choses in action, or stock and produce not removable from any farm or lands either by reason of a contract or a custom. Of every such bill of sale or written instrument a registration is required by the statute; for it is provided by s. 1, that within twenty-one days after the making of every bill of sale (*Banbury v. White*, 2 H. & C. 300), the instrument, with its schedule (*Green v. Attenborough*, 2 H. & C. 468), or inventory, or a copy, must be filed in the Queen's Bench (*Cheney v. Courtois*, 13 C. B. N. S. 634; by 24 & 25 Vict. c. 91, s. 34, no copy is to be registered unless the original is produced stamped, *Bellamy v. Saul*, 4 B. & S. 265, 32 L. J. Q. B. 366), and there must be also filed together with it (*Grindell v. Brendon*, 6 C. B. N. S. 698), an affidavit deposing to the time at which the instrument was made, and giving a description of the residence (*Attenborough v. Thompson*, 2 H. & N. 559; *Blackwell v. England*, 8 E. & B. 540; *Hewer v. Cox*, 3 El. & El. 428; 30 L. J. Q. B. 73), and occupation (*Allen v. Thompson*, 1 H. & N. 15; *Morewood v. The South Yorkshire Railway Company*, 3 H. & N. 798; *Pickard v. Bretz*, 5

H. & N. 9; *Foulger v. Taylor*, 5 H. & N. 202; *Hatton v. English*, 7 E. & B. 94; *Beales v. Tennant*, 29 Law J. Q. B. 188; *Gray v. Jones*, 14 C. B. N. S. 743; *General Furnishing and Upholstery Co. v. Venn*, 32 L. J. Exch. 220; S. C. 2 H. & C. 153; *Adams v. Graham*, 32 L. J. Q. B. 71; *London and Westminster Loan Co. v. Chace*, 12 C. B. N. S. 730; S. C. 31 L. J. C. P. 314), of the person making it; or if it be made by any person under or in execution of any process then of the person proceeded against, and also of every attesting witness to the instrument. See *Nicholson v. Cooper*, 3 H. & N. 384; and *Routh v. Roublot*, 1 El. & El. 850; S. C. 28 Law J. Q. B. 280; *Banbury v. White*, 2 H. & C. 300; *Webster v. Blackmun*, 2 Fost. & Finl. 491; *In re Hams*, 10 Ir. Ch. Rep. 100; and *Wilcoxon v. Scorby*, 27 L. J. Exch. 154. If these requisites are not complied with the bill of sale is to all intents and purposes void as against assignees in bankruptcy or insolvency, or under assignments for the benefit of creditors, and as against sheriffs' officers and others seizing the property under process of any court of law or equity, and as against every person on whose behalf the process issued, with regard to all personal chattels which at or after the time of the bankruptcy, or of filing the petition, or of making the assignment, or of executing the process (as the case may be),

and after the twenty-one days (*Marples v. Hartley*, 1 B. & S. 1; S. C. 30 L. J. Q. B. 92), are in the possession or apparent possession (*Davies v. Jones*, 5 June, 1862, Exch.; *Gough v. Everard*, 2 H. & C. 1; S. C. 32 L. J. Exch. 210) of the person by whom the instrument was made, or against whom the process issued. See ss. 1 & 7. The latter of these sections declares that goods are to be deemed in the *apparent possession* of the maker of the bill of sale so long as they remain on any land or premises occupied by him, or are used and enjoyed by him in any place, notwithstanding that formal possession has been taken by or given to another. The 2nd section of the act requires conditions or defeasances to the bill of sale to be written on the same paper or parchment, see *Robinson v. Collingwood*, 17 C. B. N. S. 777; and the 3rd, 4th, and 5th sections provide the public with facilities for ascertaining the particulars of the bills of sale which have been filed. The effect of this statute has been to provide creditors with the means of detecting transfers of goods in almost all cases where the debtor is intended to remain in possession; for there is practically so much danger that the circumstances under which the act avoids the conveyance will occur, that a case can hardly happen in which the grantee can safely omit to give to the bill of sale the prescribed publicity. Reputed owner-

ship, within the meaning of the 12 & 13 Vict. c. 106, s. 125, is not affected by the act, *Badger v. Shaw*, 2 El. & El. 472; 29 L. J. Q. B. 73; and see per Turner, L. J., in *Stansfield v. Orbitt*, 27 Law J. Cha. 266. The act applies to bills of sale of future property, *Holroyd v. Marshall*, 10 Ho. of Lords Ca., 191. A bill of sale given subject to a previous bill to a third party is not vitiated by the latter being unregistered, *Edwards v. English*, 7 E. & B. 564.]

There are some cases, that for instance of the sale of a ship at sea, in which an actual delivery being impossible, no presumption of fraud can possibly arise from the substitution of one merely symbolical. *Atkinson v. Maling*, 2 T. R. 472. [In the case of British ships, notoriety of transfer is to a certain extent secured by the Merchant Shipping Act, 1854 (the 17 & 18 Vict. c. 104), which requires that when any registered ship, or any share in her, is disposed of to persons qualified to be owners of British ships, the transfer must be made by bill of sale, which must contain a description of the ship, and must be registered according to the provisions of that act. See ss. 55 and 57, and the 18 & 19 Vict. c. 91, s. 11. This does not apply to a wreck or hulk which has lost the character of a ship. *The European, &c., Mail Co. v. The Peninsular & O., &c., Co.*, Ex. T. T., 1866.]

It will be observed that the

statute of Elizabeth only declares the fraudulent conveyance to be void, "as against that person, his heirs, successors, executors, &c., who are, or might be in anywise disturbed, hindered, delayed, or defrauded." Such a conveyance is good as against the party executing it, *Robinson v. McDonnell*, 2 B. & A. 134; and also as against any other person privy and consenting to it, *Steel v. Brown and Parry*, 1 Taunt, 381: [*Olliver v. King*, 25 Law J. Cha. 427;] and as against strangers other than creditors or *bonâ fide* purchasers for valuable consideration, *Bessey v. Windham*, 6 Q. B. 166. See, as to the question of evidence raised in the latter case, *White v. Morris*, 11 C. B. 1015. [If before the conveyance is avoided the transferee assigns the goods to a *bonâ fide* purchaser for value, the transfer is valid. *Morewood v. The South Yorkshire Railway Company*, 3 H. & N. 798. A sham transfer for the purpose of defrauding creditors has been held not to pass the property in the goods even as between the debtor and his confederate, *Bowes v. Foster*, 2 H. & N. 779.]

In the principal case, *Pierce*, the grantor, was indebted to the grantee, *Twyne*, which debt would have been a sufficient consideration to support a *bonâ fide* transfer of the goods, and the ground on which the court proceeded was not that there was no sufficient consideration to sustain a grant

by Pierce to Twyne, but that the secrecy, the non-delivery, the *clausulæ inconsuetæ*, &c., raised a presumption that the whole transaction was collusive and a juggle, and though purporting to be a sale was, in reality, the creation of a trust for the benefit of Pierce; to use their own words, "it was resolved that, notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it was provided that the said act shall not extend to any estate or interest in lands, &c.; goods or chattels, made on good consideration and *bonâ fide*; for although it is on a true and good consideration, yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide*, within the said proviso, which is accompanied with any trust." In other words, although a debtor has a right to prefer one creditor to another, and by making a transfer of his property to one favoured claimant to defeat the other, provided he do so in an open manner, and without any further object than his act upon the face of it imports;—still the law will not allow a creditor to make use of his demand to shield his debtor; and, while he leaves him *in statu quo* by forbearing to enforce the assignment, to defeat the other creditors by insisting upon it. Thus, (to illustrate this position by Lord Coke's words in the prin-

cipal case,) "if a man be indebted to five several persons in the several sums of 20*l.*, and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor or some other person for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bonâ fide* within the said proviso, for the proviso saith on a good consideration *and bonâ fide*, so a good consideration doth not suffice if it be not also *bonâ fide*." There is, however no doubt but that a debtor (so he be not a trader in contemplation of bankruptcy) may openly prefer one creditor to the rest, and transfer property to him even after the others have commenced their actions, *Pickstock v. Lyster*, 3 M. & S. 371; *Holbird v. Anderson*, 5 T. R. 235; *Meux v. Howel*, 4 East, 1; *Eastwick v. Caillaud*, 5 T. R. 420; *Bowen v. Bramidge*, 6 C. & P. 142; *Goss v. Neale*, 5 B. M. 19; *Riches v. Evans*, 9 C. & P. 640, Lord Abinger; *Eveleigh v. Purssord*, 2 Mo. & R. 539, Rolfe, B.; [*Wolverhampton and Staffordshire Banking Company v. Marston*, 7 H. & N. 148; S. C. 30 L. J. Exch. 402]. See however *Owen v. Body*, 5 A. & E. 28. Upon this

footing stands a deed executed for the benefit of creditors, so soon as any creditor knows of and assents to it; *Harland v. Binks*, 15 Q. B. 713; [or without his assent, if the assignment be to a creditor and be communicated to him. *Siggers v. Evans*, 5 E. & B. 367; and *Evans v. Jones*, 3 H. & C. 423, where the transfer was by a trust deed under the Bankruptcy Act, 1861]. And it is broadly laid down in *Wood v. Dixie*, 7 Q. B. 892, that a sale of property for good consideration is not, either at common law or under the statute, void merely because it is made with intent to defeat the expected execution of a judgment creditor [accord. *Hale v. the Saloon Omnibus Company*, 4 Drew. 492; *Darvill v. Terry*, 6 H. & N. 807; S. C. 30 L. J. Exch. 355; but see *Bott v. Smith*, 21 Beav. 511. The statute has been held to avoid an assignment in consideration of past debts, by a person in a dying state, of policies of insurance on his life, *Stokoe v. Cowan*, 30 L. J. Cha. 882, Rolls]. An assignment of all his effects in trust for his wife, by a man about to be tried for felony, has been held to come within this statute, and to be fraudulent and void as against the crown, *Shaw v. Bean*, 1 Stark. 319; *Jones v. Ashurst*, Skinn. 357; *Morewood v. Wilkes*, 6 C. & P. 145; and *Pauncefoot's Case*, *sup.* pp. 5, 6. *Vide R. v. Bridger*, 1 M. & W. 145; [*Saunders v. Wharton*, 32 L. J. Cha. 224; but

an assignment before conviction, by a person guilty of felony, will, if made for good consideration and *bona fide*, be good, *Chowne v. Baylis*, 31 Beav. 351; 31 L. J. Cha. 757, M. R.]. A deed has been held void which purported to create a trust for all the creditors, but contained terms which [might], if accepted, have imposed on them the liability of partners. *Owen v. Body*, 5 A. & E. 22. That case was, however, distinguished in *Janes v. Whitbread*, 11 C. B. 406; and *Coates v. Williams*, 7 Exch. 205, (where the power given to the trustees to carry on the business only extended to winding it up;) [and has been explained in *Hickman v. Cox*, 18 C. B. 817; 3 C. B., N. S. 523; 8 Ho. of Lords Ca. 268; 9 C. B., N. S. 4; which decides that the execution by the creditors of a deed by which the debtor assigns his property to trustees in trust to continue his trade, and apply the profits in discharge of their claims, does not make them partners]. A deed of separation, (reciting an agreement to separate in consequence of disputes,) and whereby the husband granted an annuity to trustees for his wife's benefit, has been holden void as against creditors, *Clough v. Lambert*, 10 Sim. 174; and see *Frampton v. Frampton*, 4 Beav. 287; *Cowx v. Foster*, 1 Johns. & Hem. 30. [And where an insolvent trader had sold his property, partly in consideration of an annuity to his wife if she survived

him, she was, on his death, declared to be a trustee of the annuity for the creditors, *French v. French*, 6 De G. M. & G. 95, and see *Neale v. Day*, before Wood, V. C., 28 L. J., Cha. 45. A marriage settlement on the wife will, though the marriage was honestly contracted, be void against creditors on the husband's bankruptcy, if she knew he had committed an act of bankruptcy within such period as to be capable of sustaining the adjudication, and after the accruing of the petitioning creditor's debt, *Frazer v. Thompson*; 4 De G. & J. 659; so where there is an intent to defraud and delay the creditors, and the marriage was merely part of a scheme to protect the property from their claims, *Columbine v. Penhall*, 1 Sm. & Giff. 228. See also where a deed of dissolution of partnership was held void against creditors as being *malâ fide*, *Ex parte Mayou*, 34 L. J.; Ba. 25. As to the favour accorded in Chancery to family arrangements, see *Penhall v. Elwin*, 1 Sm. & Giff. 258.]

A judgment and execution "contrived of malice" are within the same mischief and same rule as a gift or assignment. An early case on this subject is *West v. Skipp*, 1 Ves. sen. 244, in which it is laid down by Lord Hardwicke, that if a creditor seize the goods of his debtor and suffer them to remain long in his hands, this is evidence of fraud. See *Lovick v.*

Crowder, 8 B. & C. 132; *Imray v. Magnay*, 11 M. & W. 267; *Hunt v. Hooper*, 12 M. & W. 664.

It has been said by Lord Mansfield, that "the principles of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by stat. 13 Eliz. c. 5," [and see per Lord Westbury, L. C., in *Ex parte Mayou*, ubi suprâ]. The question, whether a gift be fraudulent within the meaning of this statute is very different indeed from the question, whether, if made by a trader, it would be fraudulent, and an act of bankruptcy within the meaning of the bankrupt act. The latter question may be answered in each case by reference to one of the following three rules:—

1. Any transfer which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent, and an act of bankruptcy, under the bankrupt act; and void as against the assignees upon an insolvency. *Doe d. Grimsby v. Ball*, 11 M. & W. 531 [and the judgment of Lord Wensleydale in *Billiter v. Young*, 6 E. & B. 17].

2. Any conveyance to a creditor by a trader of his whole property, or of the whole with an exception merely nominal, in consideration of a bygone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent under the bankrupt act, and an

act of bankruptcy, *Lindon v. Sharp*, 7 Scott, N. R. 730 ; 6 Man. & Gr. 895, S. C. ; *Graham v. Chapman*, 12 C. B. 85 ; *Hutton v. Cruttwell*, 1 E. & B. 15 ; *Young v. Waud*, 8 Exch. 221 ; *Smith v. Cannan*, 2 E. & B. 35 ; [*Bittlestone v. Cooke*, 6 E. & B. 296 ; *Hale v. Allnutt*, 18 C. B. 505 ; *Bell v. Simpson*, 2 H. & N. 410 ; *Harris v. Rickett*, 4 H. & N. 1 ; *Smith v. Timms*, Cam. Scac., 1 H. & C. 849 ; S. C. 32 L. J. Exch. 215 ; *Lacon v. Liffen*, 32 L. J. Cha. 315 ; *Pennell v. Reynolds*, 11 C. B. N. S. 709 ; *Turner v. Hardcastle*, 11 C. B. N. S. 683 ; S. C. 31 L. J. C. P. 193 ; *Whitmore v. Claridge*, 31 L. J. Q. B. 141, affirmed 33 L. J. Q. B. 87 ; *Ex parte Lewis*, 31 L. J. Ba. 11 ; *Ex parte Colemere*, 35 L. J. Ba. 8 ; *Young v. Fletcher*, 3 H. & C. 732]. The note to *Graham v. Chapman*, 12 C. B. 94 (a), as to the date of the introduction of this rule into the Bankrupt Law is erroneous, *Law v. Skinner*, 2 W. Bl. 996, having been decided in 15 Geo. III. (not 15 Geo. II., as there incorrectly stated), upon the authority of *Worsely v. De Mattos*, 1 Burr. 467, decided in 31 Geo. II.

3. A transfer by a trader of part of his property to a creditor, in consideration of a by-gone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent, and an act of bankruptcy under the bankrupt act, if made *voluntarily* and *in contemplation of bankruptcy* ;

or if it otherwise have the effect of defeating or delaying creditors, *Smith v. Cannan*, 2 E. & B. 35 ; [*Young v. Fletcher*, 3 H. & C. 732, S. C. 34 L. J. Exch. 154 ; *Bills v. Smith*, 34 L. J. Q. B. 68].

It has been laid down that a voluntary conveyance is not fraudulent against creditors within the 13th Eliz., unless the party making it was indebted at the time, or nearly so ; *Holcroft's Case*, Dyer, 294 (b) ; *Stephen v. Olive*, 2 Bro. R. 9 ; *Lush v. Wilkinson*, 5 Ves. 384 ; B. N. P. 257 ; and indeed Lord Alvanley has said that to invalidate a settlement made after marriage, by the 13th Eliz., the settlor must be in insolvent circumstances, 5 Ves. 384 ; see *Shears v. Rogers*, 3 B. & Ad. 362 ; *Battersbee v. Farrington*, 1 Swanst. 106 ; *Russell v. Hammond*, 1 Atk. 15 ; *Middlecombe v. Marlow*, 2 Atk. 220 ; *Lord Townsend v. Wyndham*, 2 Ves. 1, 10. In some instances, however, a contrary doctrine has prevailed : see B. N. P. 257 ; *Townsend v. Westacott*, 2 Beav. 340 ; 4 Beav. 58, S. C. : where the grantor was considerably in debt at the time, and insolvent within three years after ; *Scarf v. Soulby*, 1 Mac. & G. 364 ; where Lord Cottenham approved of the decision in *Townsend v. Westacott* ; [*French v. French*, 7 De G. Mac. & G. 95, where the fact that the creditors were delayed, and not the sufficiency of the estate, if realised, to pay all the debts, was considered to be

the criterion;] and it would be difficult to contend that a conveyance proved to be made *with the express intent* to defraud even *future* creditors would not be void as against them, indeed that very point seems involved in *Tarback v. Marbury*, 2 Vern. 510, and *Hungerford v. Earle*, 2 Vern. 261. [See also *Jenkyn v. Vaughan*, 3 Drewry, 419; and *Barling v. Bishop*, 6 Jur. N. S. 812.] And, if the conveyance does not leave the grantor enough to pay his present debts, he is for this purpose considered as if insolvent at the time of the conveyance. *Jackson v. Bowley*, 1 Car. & M. 97, Erskine, J. [But the deed may be void though it do leave him enough, *Spirett v. Willows*, 34 L. J. Cha. 365. See further, as to what constitutes insolvency, *R. v. Saddlers' Co.*, 10 Ho. of L. Ca. 404; S. C. 32 L. J. Q. B. 337. The result of the cases is thus stated by Wood, V. C., in *Holmes v. Penney*, 3 Kay & J. 99: "The mere fact of a settlement being voluntary is not enough to render it void against creditors; but there must be unpaid debts, which were existing at the time of making the settlement, and the settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were

creditors of the settlor. . . Where, in order to evade the statute, a person being considerably indebted makes a voluntary settlement, which would be void if impeached by those who were then his creditors, and afterwards pays them off, and a new set of creditors stand in their places, . . . such a settlement would be void against the subsequent creditors, because it would be a fraud on the statute." In *Spirett v. Willows*, 34 L. J. Cha. 367, the Lord Chancellor (Westbury) says "there is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors; but I think the following conclusions are well founded. If the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to 'delay, hinder, or defraud creditors,' or that after the settlement the settlor had no sufficient means or reasonable expectations of being able to pay his then existing debts; that is to say, was

reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to 'delay, hinder, or defraud creditors,' and is therefore fraudulent and void. It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby, in the event, the remedies of creditors, whose debts existed at the time, are 'delayed, hindered, or defrauded.'"] It has been held to make no difference that the debt was contracted, not by the party making the conveyance but by his ancestor from whom he derived the estate, *Ap-harry v. Bodingham*, Cro. Eliz. 56; *Gooch's Case*, 5 Rep. 60; see *Richardson v. Horton*, 7 Beav. 112; and as a fraudulent conveyance by the heir is void, so is one by an executor or administrator of the property of the deceased, and he is chargeable with what he so conveys as assets, *Doe v. Fal-lows*, 2 Tyrwh. 460, 2 C. & J. 481. And property fraudulently conveyed by the deceased himself is, in contemplation of law, assets for payment of his debts in the hands of his executors, *Shears v. Rogers*, 3 B. & Ad. 363. By sec. 3 of st. 13 Eliz., parties to the fraudulent conveyance, bond, &c., forfeit a year's value of the lands or tenements conveyed, the whole value of the chattels, and the amount of any covenant bond, half to the crown, and half to the parties grieved; the assignees of an insolvent are *parties grieved* within this section, *Butcher v. Harrison*, 4 B. & Ad. 129; the fraudulent conveyance being void as against them. *Doe d. Grimsby v. Ball*, 11 M. & W. 531.

As a general rule, in the case of ordinary creditors, where the debtor is not dead, bankrupt, or insolvent, the statute of 13 Eliz. operates only upon property capable of being taken in execution. Thus, before 1 & 2 Vict. c. 110, it is found laid down that copyholds are not, generally speaking, within 13 Eliz., on account of their not being, generally speaking, subject to debts, *Matthews v. Feaver*, 1 Cox, Ch. Ca. 278, and the same is stated to be the law, since that statute, in a learned work, 1 Scriven on Copyholds, by Stalman, 146. It would seem, however, that the law is otherwise, since the 11th section of that statute has subjected copyholds, like other lands, to execution by elegit. With regard to choses in action, it has been laid down by Lord Cot-tenham, in *Norcutt v. Dodd*, Cr. & Ph. 100, that a voluntary assignment of a chose in action is not fraudulent as against creditors, within the meaning of st. 13 Eliz., during the lifetime of the assignor, since it could not be reached by

an execution. But that, after his death, it might be treated as fraudulent in a proceeding against the executor, because the choses in action would have been assets in his hands available towards payment of the creditors; and that in case of an insolvency it becomes fraudulent by the conjoint operation of 13 Eliz. c. 5, and the insolvent act. Pursuing this doctrine, it should seem [and, since the 4th edition of this work, has been decided] that a voluntary assignment of such choses in action as are seizable in execution by the provisions of 1 Vict. c. 110, would now be subject to the operation of 13 Eliz. c. 5. [*Barrack v. McCulloch*, 3 Kay & J. 110.] And, with submission, an assignment of a chose in action, (or other property not seizable in execution), under circumstances which (if the property were seizable) would make the conveyance void under 13 Eliz. c. 5, seems void in case of a subsequent bankruptcy or insolvency as against the assignees, who, but for the assignment, would be entitled to the property, *Norcutt v. Dodd*, *suprà*. In *Sims v. Thomas*, 12 A. & E. 536, it was laid down as a general proposition that a voluntary assignment of a bond (before 1 & 2 Vict. c. 110) was not void as against creditors; but the important distinction between an ordinary execution, under which the bond could not have been taken, and the statutory execution, so to speak, of an insol-

veny, does not appear to have been there adverted to. Perhaps it was considered not to arise upon the pleadings.

The effect of 13 Eliz. c. 5 upon the sheriff's duty has been explained by the Court of Exchequer in *Imray v. Magnay*, 11 M. & W. 267; from which decision it follows that the sheriff is bound (at all events if he have notice of the fraud) to seize and sell, notwithstanding a fraudulent assignment or judgment and execution, and that if he do not, an action lies against him. That case was followed by *Christopherson v. Burton*, 3 Exch. 160, and recognised in *Shattock v. Carden*, 6 Exch. 727. In *Remmett v. Lawrence*, 15 Q. B. 1010, however, Lord Campbell expressed a wish to have the case of *Imray v. Magnay* reconsidered.

The statute 27 Eliz. c. 4, being *in pari materia* with the 13 Eliz. c. 5, is referred to in the text, in illustration of the doctrine there laid down, respecting the construction of the latter statute. The 27 Eliz. (rendered perpetual by 30 Eliz. cap. 18) was enacted for the protection of *purchasers*, as 13 Eliz. was for that of *creditors*. It enacts that every conveyance, grant, charge, lease, estate, and limitation of use of, in, or out of any *lands, tenements, or other hereditaments* whatsoever, for the intent and purpose to defraud and deceive such persons, bodies politic, &c., as shall purchase the

said lands, &c., or any rent, profit, or commodity, in or out of the same, shall be deemed and taken, only against that person or persons, bodies politic, &c., and his or their heirs, successors, executors, administrators, and assigns, and against every one lawfully claiming under them who shall so purchase for money or any good consideration, the said lands, &c., or any rent, &c., to be *wholly void*, frustrate, and of none effect.

Under this act it is held that not merely is a conveyance executed *with express intention to defraud* subsequent purchasers for value void as against them, see *Burrell's Case*, 6 Rep. 72; *Gooch's Case*, 5 Rep. 60; and *Standen v. Bullock*, cited *ante*, p. 6: but a *voluntary* conveyance is so likewise, even though the subsequent purchaser have notice of it, *Goodright v. Moses*, 1 Bl. 1019; *Evelyn v. Templar*, 1 Bro. R. 148; *Doe v. Manning*, 9 East, 59; *Cormick v. Trapaud*, 8 Dow, 60; for the very execution of a subsequent conveyance sufficiently evinces the fraudulent intent of the former one. It is, however, good as against the grantor, who therefore cannot as against a purchaser without notice compel specific performance of a subsequent contract to purchase for value. *Smith v. Garland*, 2 Mer. 123. See *Wilkins v. Ormsby*, 5 Beav. 153. The fifth section of the same statute enacts, that if any person shall make any conveyance of lands,

with a clause of revocation, at his will and pleasure, of such conveyance; and, after such conveyance, shall bargain, sell, grant, demise, convey, or charge the same lands to any person or persons for money or other good consideration, the said first conveyance not being revoked, that the said first conveyance, as against such bargainees, vendees, lessees, their heirs, successors, executors, administrators, and assigns, shall be void and of none effect. See the observations on this section in the principal case. A power to mortgage to any extent is a power of revocation within the meaning of this section, *Tarback v. Marbury*, 2 Vern. 511. But a power to charge with a particular sum is, if no fraud be found, not so, *Jenkins v. Kemish*, 1 Lev. 152. A power to lease for any number of years, with or without rent, is also a power of revocation within this section: for both that and the mortgage power enable the party exercising them to defeat the estate in substance, *Lavender v. Blackstone*, 2 Lev. 146. But a power to be exercised with the consent of third persons is not within this clause, unless, as in the case put in the text, they be under the control of the settlor, *Buller v. Waterhouse*, 2 Show. 46.

A mortgagee is a *purchaser* within the meaning of the 27 Eliz., *Chapman v. Emery*, Cowp. 279. As to an equitable mortgagee, see *Buckle v. Mitchell*, 18

Ves. 100; *Lister v. Turner*, 5 Hare, 281; *Kerrison v. Dorrien*, 9 Bing. 76. And so is a lessee at a rack-rent, *Goodright v. Moses*, 2 Bl. 1019; or a person who releases a contested right in consideration of the conveyance to him, *Hill v. Bishop of Exeter*, 2 Taunt. 69; or the purchaser under a settlement made in consideration of an intended marriage, *Douglas v. Ward*, 1 Cha. Ca. 79; but not under a post-nuptial settlement, unless made in pursuance of articles entered into before marriage, *Martin v. Scudamore*, 1 Cha. Ca. 170, for one voluntary conveyance cannot defeat another, *Clavering v. Clavering*, 2 Vern. 473; 1 Abr. Eq. 24. And *semble* that the articles ought to be binding ones, *Doe d. Barnes v. Rowe*, 4 Bing. N. C. 737. [A judgment creditor is not a purchaser within the meaning of the act, *Bevan v. The Earl of Oxford*, 6 De G. Mac. & G. 507; see *Benham v. Keane*, 31 L. J. Ch. 129.]

A will is looked on as a voluntary conveyance, *Villiers v. Beaumont*, 1 Vern. 100; *Boughton v. Boughton*, 1 Atk. 625. See 3 Swanst. 411, 414, *in notis*. And there may be cases in which, on account of the inadequacy of the price, a question may arise, whether a subsequent conveyance, though *some* value pass, be not *in effect* voluntary, and a mere trick for the purpose of invalidating a former one. *Doe v. James*, 16 East, 212. See an analogous case,

Persse v. Persse, 7 Cl. & F. 279, *post*, 29, [and *Owen v. Owen*, 3 H. & C. 88]. A lessee without fine or rent is not a purchaser within the statute, *Upton v. Bassett*, Cro. Eliz. 444; cited also in *Twyne's Case*.

It has been decided by *Doe d. Newman v. Rusham*, [17 Q. B. 723, and *Lewis v. Rees*, 3 Kay & J. 132], in accordance with *Parker v. Carter*, 4 Hare, 409, and overruling the decision of the Court of Exchequer in Ireland in *Jones v. Whitaker*, L. & T. 14, that a *bonâ fide* purchaser for value from the heir-at-law or devisee of one who has made a voluntary conveyance is not within the statute. And the rule laid down in *Doe v. Rusham* equally excludes from the benefit of the statute a purchaser for value from a person claiming under a second voluntary conveyance, or from any other than the person who made the voluntary conveyance in his life-time. For a like reason, in *Richards v. Lewis*, 11 C. B. 1035, where a woman before her marriage had executed a voluntary conveyance of leaseholds, it was held that upon her subsequent marriage without any settlement, the leaseholds did not vest in her husband as a purchaser for value under 27 Eliz.; for, though marriage is a valuable consideration, yet the husband taking merely by operation of law was not a purchaser within the statute. In both the last cited cases [and in *Lewis v. Rees*, 3 Kay

& J. 141] it was laid down that the resolution in *Burrell's Case*, 6 Rep. 72, that "if a father makes a lease by fraud and covin of his land to defraud others to whom he shall demise or sell it (and all fraudulent leases shall be so intended), and before the father sells or demises he dies, and the son, knowing or not knowing of the lease, sells the land on good consideration, the vendee shall avoid the lease by the act 27 Eliz.," is to be understood as applying only to a case of actual fraud; and the case of *Warburton v. Loveland*, 6 Bligh, N. S. 30, is explained as having turned upon the construction of the Registry Acts.

In 27 Eliz. there is a proviso, sect. 4, similar to that in 13 Eliz. sect. 6, in favour of *bonâ fide purchasers*. Such are considered, persons taking under instruments made *bonâ fide* and for a valuable consideration, *Roe v. Mitton*, 2 Wils. 356; or under ante-nuptial settlements, *Kirk v. Clark*, Prec. in Cha. 275; or post-nuptial settlements made in consideration of ante-nuptial articles; or of an additional portion, *Dundas v. Dutens*, 2 Cox, 235; *Jones v. Marsh*, Forest. 63; *Browne v. Jones*, 1 Atk. 188; *Spurgeon v. Collier*, 1 Eden, 55; or in consideration of the wife's joining to destroy an ante-nuptial settlement, *Scott v. Bell*, 2 Lev. 70; or of the husband giving up his interest in his wife's estate, *Hewison v. Negus*, Lords Justices, [16 Beav. 594,] 22 L. J.

655 [S. C.]; as to the invalidity of a post-nuptial settlement of the wife's estate without such consideration, [and of such a settlement when made in pursuance of a merely parol ante-nuptial agreement,] see *Butterfield v. Heath*, [15 Beav. 408, S. C.,] 22 Law J. 270, [and *Warden v. Jones*, 2 De G. & Jones, 76.] So also persons who between the voluntary settlement and the purchase have acquired as purchasers under the voluntary settlement any legal or even equitable right. *Prodgers v. Langham*, 1 Sid. 133. *The East India Co. v. Clavell*, Pr. Ch. 377, seems opposed to *Prodgers v. Langham*, but the latter case was not referred to in the former, and it was approved of by Lord Eldon, *George v. Milbanke*, 9 Ves. 193, and by Lord Kenyon, *Parr v. Eliason*, 1 East, 95, where it is called "a very leading authority," [See the case of *The East India Co. v. Clavell*, explained in *Payne v. Mortimer*, 28 L. J. Ch. 716,] *Smartle v. Williams*, 3 Lev. 387, Skinn. 423; *Kirk v. Clark*, Prec. Cha. 275; *Brown v. Carter*, 5 Ves. jun. 862; *George v. Milbank*, 9 Ves. 190; *Meggison v. Foster*, 2 Y. & C. C. C. 336. There have been some cases in which the question has been, how far the consideration of marriage will extend, and whether limitations in favour of very remote objects may not be void as against subsequent purchasers. See *Jenkins v. Kemish*, Hard. 395; *White v.*

Stringer, 2 Lev. 105; *Osgood v. Strode*, 3 P. Wms. 245; *Ball v. Bamford*, Prec. in Cha. 113; *Reeves v. Reeves*, 9 Mod. 132; *Hart v. Middlehurst*, 3 Atk. 371. In two of the later cases on the subject a limitation to the issue of the settlor by a second marriage, was certified by the King's Bench not to be voluntary, *Clayton v. Earl of Winton*, 3 Madd. 302. And a limitation to the brothers of the settlor to be voluntary, *Johnson v. Legard*, *ibid.* 283; [S. C. Turn. & R. 295;] see *Stackpoole v. Stackpoole*, 4 Dru. & War. 326. So a limitation in a marriage settlement of the wife's land, in default of children, for the benefit of her brothers and sisters, has been holden void as against a *bonâ fide* purchaser for value from the husband and wife, *Cotterell v. Homer*, 13 Sim. 506. In *Heap v. Tonge*, 9 Hare, 104, the Vice-Chancellor Turner laid it down, that limitations in favour of collaterals are to be supported, if there be any party to the settlement who purchases on their behalf; and he referred to the example put by Lord Eldon in *Pulvertoft v. Pulvertoft*, 18 Ves. 92, where he says, "In the case for instance of a father, tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son to settle not only on his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the con-

sideration of the marriage, are not within the contract between the father and the son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, I will not agree unless you will so settle." As to the validity of such a limitation between the contracting parties themselves, see *Davenport v. Bishopp*, 2 Y. & Col. C. C. 451. A settlement made by a widow about to take a husband upon the children of her former marriage, was upheld by Lord Hardwicke against a subsequent mortgagee, *Newstead v. Serles*, 1 Atk. 265; [and so in *Clarke v. Wright*, 5 H. & N. 401, (affirmed in Cam. Scacc. 6 H. & N. 849; S. C. 30 L. J. Exch. 113.) in a marriage settlement of the woman's property, was a provision for her illegitimate child]. The title of one who purchased for valuable consideration, from a person who had obtained a conveyance by fraud, of which he however had no notice, falls within the above proviso, and cannot be impeached. *Doe v. Martyr*, 1 N. R. 332. The existence of a valuable consideration, though it should differ from the consideration specified in the instrument, may be proved, in order to rebut fraud and establish a right to the benefit of the proviso; thus, where a deed purported to be in consideration of love and affection, evidence was allowed that the grantor was under a bond to support the objects of it,

Gale v. Williamson, 8 M. & W. 405; see *Pott v. Todhunter*, 2 Coll. C. C. 76.

★ The adequacy of the consideration is an important element in forming a conclusion as to the *bona fides* of the transaction. (See *Doe v. James*, 16 East, 212, *ante*, p. 26.) In no case, however, can inadequacy of consideration alone be said, as a proposition of law, conclusively to establish *mala fides*. The relationship of the parties, and other circumstances, may explain away its *prima facie* effect. For instance, a conveyance in a deed, by way of family arrangement, part of the inducement to execute which is obviously natural love and affection, may be sustained by any valuable consideration not very inadequate, *Persse v. Persse*, 7 Cl. & F. 279. See *Pott v. Todhunter*, 2 Collyer, C. C. 76; *Parker v. Carter*, 4 Hare, 409; *Heap v. Tonge*, 9 Hare, 90, where an amicable settlement of a supposed claim under a lost will was upheld. The joinder of a necessary party in a conveyance is not always a sufficient consideration. It has been held not to be so where a limitation was made, not for his benefit or at his desire, nor in pursuance of any contract of his, *Doe d. Baverstock v. Rolfe*; 8 A. & E. 650.

The statute of 27 Eliz. was, perhaps, a more beneficial enactment than that of 13 Eliz., for it has been laid down, that at common law no fraud was remedied which

should defeat an after purchase, but only that which was committed to defraud a former interest. Cro. Eliz. 445, and *ante*, p. 9; yet there is a *dictum* of Lord Mansfield's to the contrary, in *Cadogan v. Kennett*, Cowp. 434. The words of the act, it will be observed, are very large and comprehensive. They include every "conveyance, grant, charge, lease, estate, and limitation of use." Therefore, it has been held that the uses declared on a recovery might be void as against a subsequent purchaser, though the recovery itself remained valid and destroyed an estate tail for his benefit, *Doe d. Baverstock v. Rolfe*, 8 A. & E. 650; *Tarleton v. Liddell*, [17 Q. B. 390]. Copyholds are within this act, *Doe v. Bottriell*, 5 B. & Ad. 131; *Currie v. Nind*, 1 Myl. & Cr. 17; *Doe d. Baverstock v. Rolfe*, 8 A. & E. 650. [So are equitable interests, *Barton v. Vanheythusen*, 11 Hare, 126.] But not personal property, *Jones v. Croucher*, 1 Sim. & Stu. 315, and Sugd. V. & P. 936, 11th ed.

There are also cases to which, from their nature, as importing the absence of valuable consideration, the statute of 27 Eliz. c. 4, does not, it seems, extend; for instance, a voluntary endowment of a charity is not defeated by a subsequent conveyance for valuable consideration, *Corporation of Newcastle v. Attorney-General* 12 Cl. & F. 402.

DUMPOR'S CASE.

HIL. 45 ELIZ.—IN THE KING'S BENCH.

[REPORTED 4 COKE, 119.]

When a condition not to alien without licence is determined by the first licence granted.—Apportionment of conditions.

[The rule laid down in this case has been done away with by stat. 22 & 23 V. c. 35, so far as relates to conditions contained in leases. See *post*, 34, *in notd.*]

Co. Ent. 684.
pl. 22.
Cr. El. 815,
816.

See 3 Wilson,
234.

IN trespass between Dumpor and Symms, upon the general issue, the jurors gave a special verdict to this effect: the President and Scholars of the College of Corpus Christi, in Oxford, made a lease for years in anno 10 Eliz. of the land now in question, to one Bolde, *proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special licence of the lessors. And afterwards the lessors by their deed, anno 13 Eliz., licensed the lessee to alien, or demise the land, or any part of it, to any person or persons quibuscunque.* And afterwards, anno 15 Eliz., the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The President and Scholars, by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for twenty-one years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespass was brought; and that upon the lease made to Bolde, the yearly rent of 33s. 4d. was reserved,

and upon the lease to the plaintiff, the yearly rent of 22s. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the Court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved ;

1st. *That the alienation by licence to Tubbe, had (a) deter-* (a) 1 Roll. Rep. 70, 390.
mined the condition, so that no alienation which he might 1 Roll. 422, 471.
 afterwards make could break the proviso, or give cause of 2 Bulst. 291.
 entry to the lessors, for the lessors could not dispense Cro. Jac. 398.
 with an alienation for one time, and that the same estate 3 Co. Pennant's case.
 should remain subject to the proviso after. And although 3 Ed. 6, Dyer, 66. a.
 the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their licence, inasmuch as the assignee has the same term which was assigned by their assent : so if the lessors dispense with one alienation, they thereby dispense with all alienations after ; for inasmuch as by force of the lessor's licence, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee who has his estate and interest shall be subject to the first condition : and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessor dispense with one, all the others are at liberty. And therefore it was adjudged, Trin. 28 Eliz. Rot. 256, *in Com. Banco inter Leeds* (b) and Compton, that where (b) 1 Roll. 472
 the Lord Stafford made a lease to three, upon condition Cro. El. 816.
 that they or any of them should not alien without the Godb. 93.
 assent of the lessor, and afterwards one alienated by his Noy 32.
 assent, and afterwards the other two without licence, and 4 Leon. 58.
 it was adjudged, that in this case the condition being 2 Bulstr. 291.
 determined as to one person (by the licence of the lessor) was determined in all. And (c) Popham, Chief Justice, (c) Styles 317.
 denied the case in 16 Eliz., Dyer (d), 334 ; that if a man (d) Dy. 334. pl. 32.
 leases land upon condition that he shall not alien the Cro. El. 816.
 land, or any part of it, without the assent of the lessor, Styles 334.
 and afterwards he aliens part with the assent of the Moor 205.
 lessor, that he cannot alien the residue without the assent

(a) Co. Lit.
215. a.

(b) Dyer 308,
309, pl. 75.
5 Co. 55. b.
Moor 97, 98.
[By 22 & 23
Vict. c. 35, s. 3,
where the re-
version on a
lease is severed
and the rent is
legally appor-
tioned, the as-
signee of each
part of the re-
version is en-
titled in respect
of the appor-
tioned rent to
the benefit of
the condition.
As to the
apportionment
of a rent-
charge, or rent-
service, divided
by act of the
parties, see per
Byles, J., 11
C. B. N. S.
253.]

(c) Co. Lit.
215. a.
Cro. Jac. 390.
5 Co. 55. b.
(d) 3 Bulstr.
154. Co. Lit.
215. a.

(e) 1 Rol. Rep.
331. Co. Lit.
215. a. See
*Baron and
Baroness de
Rutzen v.
Lewis*, 5 A. &
E. 277. The
assignee of part
of the reversion
in the entire of
the land may take advantage of a condition, *Wright v. Burroughs*, 3 C. B.
631. See, as to the indivisibility of a condition precedent, *Neale v. Ratcliffe*, 15 Q. B. 916.
(f) 1 Rol. Rep. 331. Moor 203.

of the lessor: and conceived, that is not law, for he said the condition could not be divided or (a) appointed by the act of the parties; and in the same case, as to parcel which was aliened by the assent of the lessor, the condition is determined; for although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by licence, and, therefore, the condition being determined in part, is determined in all. And therefore, the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. *Nota*, reader, *Paschæ* 14 Eliz. Rot. 1015, *in Com. Banco*, that where the lease was made by deed indented for twenty-one years of three (b) manors, A., B., C., rendering rent, for A. 6*l.*, for B., 5*l.*, for C. 10*l.*, to be paid in a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled, bargained and sold the reversion of one house and forty acres of land, parcel of the manor of A., to one of his heirs, and afterwards by another deed indented and enrolled, bargained and sold all the residue to another and his heirs, and if the second bargainee should enter for the condition broken or not was the question: and it was adjudged, that he should not enter for the (c) condition broken, because *the condition being entire, could not be apportioned by the act of the parties*, but by the severance of part of the reversion it is destroyed in all. *But it was agreed, that a condition may be (d) apportioned in two cases.* 1. *By act in law.* 2. *By act and wrong of the lessee.* By act in law, as if a man seised of two acres, the one in fee, and the other in (e) borough English, has issue two sons, and leases both acres for life or years, rendering rent with condition, the lessor dies, in this case by this descent, which is an act in law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee makes a feoffment of part, or commits waste (f) in

the land may take advantage of a condition, *Wright v. Burroughs*, 3 C. B. 631. See, as to the indivisibility of a condition precedent, *Neale v. Ratcliffe*, 15 Q. B. 916.

part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee: and the Lord Dyer, then Chief Justice of the Common Pleas, in the same case, said, that *he who enters for a condition broken, ought to be in of the same estate which he had at the time of the condition created, and that he cannot have, when he has departed with the reversion of part: and with that reason agrees* Litt. 80, b. And *vide* 4 & 5 Ph. & Mar. Dyer (a), 152, (a) Dy. 152. where a proviso in an indenture of lease was that the lessee, his executors or assigns, should not alien to any person without licence of the lessor, but only to one of the sons of the lessee; the lessee died, his executor assigned it over to one of his sons, it is held by Stamford and Catlyn, that the son might alien to whom he pleased, without licence (+), for the condition, as to the son, was determined, which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the statutes of 13 Eliz. cap. 10, and 18 Eliz. cap. 11, concerning leases made by Deans and Chapters, Colleges, and other ecclesiastical persons are (b) general laws whereof the court ought to take knowledge, although they are not found by the jurors, and so it was resolved between Claypole and Carter in a writ of error in the King's Bench. (b) 2 Rol. 765. Yelv. 106. Doct. pl. 337, 338. Noy. 124. 2 Brownl. 208. Cro. El. 816. Moor 593. 1 Leon. 306, 307.

(+) *Quære*, see *Lloyd v. Crispe*, 5 Taunt. 249, *post in notâ*.

[This decision was acted on for a long time, although more than once disapproved of.] In *Doe v. Bliss*, 4 Taunt. 736, Sir James Mansfield, C. J., said, "The profession have always wondered at *Dumpor's Case*, but it has been law so many centuries, that we cannot now reverse it." In *Brummel v. Macpherson*, 14 Ves. 173, Lord Eldon said, "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land." Accordingly it [was] affirmed by many subsequent decisions, nay, it [was] even carried further, for it was held that whether the licence to assign [was] general, as in the principal case, or particular as "to one particular person subject to the performance of the covenants in

the original lease ;" still the condition [was] gone, and the assignee might assign without licence. *Brummel v. Macpherson*, 14 Ves. 173. [At length, however, the legislature interfered, and this rule has, by the operation of the statutes 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 28, ceased to be law, so far as relates to conditions in leases, and to licences and waivers of such conditions occurring after the passing of those acts. By the first section of the 22 & 23 Vict. c. 35, it is provided that where any licence to do any act which, without such licence, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease theretofore granted, or to be thereafter granted, shall at any time, after the passing of that act, be given to any lessee or his assigns, "every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made, or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorised to be done, but not so as to prevent any proceedings for any subsequent breach (unless otherwise specified in such licence) ; and all rights under covenants and powers of forfeiture, and re-entry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-

lease, or other matter not specifically authorised or made punishable by such licence, in the same manner as if no such licence had been given ; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorised to be done."

The second section of this act provides that where in any lease theretofore granted, or to be thereafter granted, there is or shall be a power or condition of re-entry on assigning, or under-letting, or doing any other specified act without licence, and a licence at any time after the passing of the act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, "such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests, or remaining property ; but such

right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence."

The above-mentioned act did not interfere with the effect of *Dumpor's Case* upon questions of waiver, but the later act—the 23 & 24 Vict. c. 38—provides, by s. 6, that where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place, after the passing of that act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

To these important enactments *Dumpor's Case* forms the best introduction. The principles there laid down are still in force, except with reference to covenants and conditions contained in leases, and to waivers and licences of such conditions and covenants occurring after the passing of these statutes; and many questions may still arise in practice with reference to transactions taking place at an earlier date. For these reasons *Dumpor's Case* has been retained, together with its note, in the present edition, with such alterations of the

language of the note as are necessary to adapt it to the present state of the law.]

At common law the licence, in order to put an end to the condition, must have been such a licence as was therein contemplated, for where the condition was not to assign *without licence in writing*, a *parol* licence was no dispensation. *Roe v. Harrison*, 2 T. R. 425; *Macher v. Foundling Hospital*, 1 V. & B. 191; *Richardson v. Evans*, 3 Madd. 218; though it is said that if such *parol* licence were used as a snare, equity would relieve. *Richardson v. Evans*, 3 Madd. 218. It seems, too, that if the condition was not in general restraint of assignment, but permitted the lessee to assign in one particular way, *ex. gr.* by will, an assignee to whom the lease had been transferred in the permitted way could not assign in any other mode. *Lloyd v. Crispe*, 5 Taunt. 249. "The ground of *Dumpor's Case*" (says Gibbs, J.) "was this: the proviso was that the lessee or his assigns should not alien the premises to any person or persons without the special licence of the lessors; the lease was therefore to be void if any assignment was made. And there the court was of opinion that if the condition was once dispensed with, it was wholly dispensed with, because the provision for making void must exist entire, or not exist at all. But here is an exception out of the original restriction to

alienate, so that in the alienation by will made by the lessees there was nothing to license." Also by defeasance properly framed to revive the condition, a licence to assign might virtually be limited to the particular assignment. See 3 Jarman's Conv. by Sweet, 685. But it was intimated by Gibbs, C. J., that there would have been great difficulty in giving that effect to any merely restrictive words in the licence. *Mason v. Corder*, 7 Taunt. 9.

Although, when such a condition as that in *Dumpor's Case* exists, alienation without licence operates as a forfeiture of the term; still, if the lessor, with knowledge of the forfeiture, receive rent due since the condition broken, such conduct upon his part operates as a waiver of his right to take advantage of it. But not so if the landlord was unaware of the fact of the forfeiture at the time of receiving the rent, *Roe v. Harrison*, 2 T. R. 425; *Doe v. Birch*, 1 M. & W. 402, unless, perhaps, where it appears from other circumstances, that the rent was accepted with an intention of continuing the tenancy notwithstanding any forfeiture that might have occurred. In *Goodright v. Davies*, Cowp. 803, the lease contained a covenant not to underlet without licence, and a power of re-entry to the lessor in case of non-observance of the covenants; the lessee underlet various parts of the premises, but the lessor

knew of it, and received rent afterwards. "The case," said Lord Mansfield, "is extremely clear. To construe this acceptance of rent due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, but does not take advantage of it, but accepts rent subsequently accrued. That shows he meant that the lease should continue. Forfeitures are not favoured in law; and when a forfeiture is once waived, the court will not assist it." See *Browning and Beston's Case*, Plowd. 133; *Roe v. Harrison*, 2 T. R. 425; *Doe d. Gatehouse v. Rees*, 4 Bing. N. C. 384 [and as to the effect of notice of one breach of covenant where several of the same kind have been committed, see *Croft v. Lumley*, 5 E. & B. 648, and the opinions of the judges in the same case in the House of Lords, 6 H. of L. C. 672]. And other acts of the lessor, besides acceptance of rent, have been held to waive a forfeiture, when they show an intention on his part that the lease should continue. *Doe v. Meux*, 4 B. & C. 606; see *Doe v. Birch*, 1 M. & W. 408; *Doe v. Baron and Baroness de Rutzen v. Lewis*, 5 A. & E. 277 [*Dendy v. Nicholl*, 4 C. B., N. S. 376; *Ward v. Day*, 4 B. & S. 337; affirmed, 5 B. & S. 359; 33 L. J., Q. B. 3, S. C.; affirmed, *ibid*, 254; *Pel-*

latt v. Boosey, 31 L. J., C. P. 281. In *Ward v. Day*, *suprà*, the forfeiture of a grant was held to be waived by the grantor having, in negotiations for a renewal of it, treated it as subsisting]. It has been laid down that there is a difference in this respect between cases where the lease is on breach of the condition to be *void* and those where it is only to be *voidable* on the lessor's re-entry. In the latter case, acceptance of rent operates as a waiver of the landlord's right to re-enter, but in the former, the lease becoming void immediately upon the breach of the condition, it has been laid down by great authorities that no subsequent acceptance of rent will set it up again. This distinction is laid down by Lord Coke, 1 Inst. 214, b., in the following terms: "Where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance, otherwise it is of a lease or estate voidable by entry." The same law is laid down equally strong in *Pennant's Case*, 3 Rep. 64; in *Browning and Beston's Case* in Plowden; see, too, *Finch v. Throckmorton*, Cro. Eliz. 221; *Mulcarry v. Eyres*, Cro. Car. 511; *Doe d. Simpson v. Butcher*, Dougl. 51, *et notas*. But this distinction was never, before the 7 & 8 Vict. c. 76, and the 8 & 9 Vict. c. 106, applied to any, save leases for years, for if a lease *for lives* contain an express condition to be

void upon the breach of any covenant by the lessee, still it is in contemplation of law only *voidable* by re-entry; for it is a principle that an estate which begins by livery can only be determined by entry. *Browning and Beston's Case*, Plowd. 133; *Doe v. Pritchard*, 5 B. & Ad. 765. Since the statutes referred to, estates for life may commence without livery, and to such estates the reasoning above seems inapplicable. Even in the case of a lease for years, where the direction is that it shall become *void* on breach of the condition; it will only be void at the option of the lessor; for the lessee shall not take advantage of his own wrongful non-performance of his contract, in order to destroy the lease, which had perhaps turned out a disadvantageous one. *Doe v. Bancks*, 4 B. & A. 401; *Read v. Farr*, 6 M. & S. 121; and see *Malins v. Freeman*, 4 Bing. N. C. 395; *Hyde v. Watts*, 12 M. & W. 254, and *Hughes v. Palmer*, 19 C. B., N. S. 393; S. C., 34 L. J., C. P. 279, decided on a similar principle; nor can any third person treat it as void until the landlord has declared his option. *Roberts v. Davey*, 4 B. & Ad. 664. In that case, in trespass *quare clausum fregit*, the defendant pleaded a licence from a previous owner of the fee. Replication, that the licence was, on breach of a certain condition, "*to cease, determine, and become utterly void and of no effect*," and that

the condition had been broken and the licence thereupon become void. Demurrer, and judgment for the defendant on the ground that, according to *Doe v. Bancks* and *Read v. Farr*, the licence was determinable only *at the option of one* who had not signified such option. In *Doe v. Bancks* and *Read v. Farr* the lease was, by the terms of it, *to be utterly void to all intents and purposes*. But in *Arnsby v. Woodward*, 6 B. & C. 519, where, in addition to the words rendering the lease void, it was stated, "*that it should be lawful for the lessor to re-enter and expel the tenant*," the court held that the addition of those words showed that it was the intent of the parties that the lease should be only voidable by re-entry; and consequently that the landlord had, by a subsequent receipt of rent, waived the forfeiture: and in *Doe v. Birch*, 1 M. & W. 403, a clause that, on the breach of certain stipulations, "it should be lawful for the lessor to re-take possession of the premises, *and that the agreement should be null and void*," was held to have the same effect, and to admit the question of waiver. See also *Dakin v. Cope*, 2 Russ. 170. This shows with what strictness the courts will read such a proviso in order to prevent an absolute forfeiture. Indeed, in *Arnsby v. Woodward*, Lord Tenterden said, that supposing the proviso had been in the very same words as in *Read v.*

Farr and *Doe v. Bancks* he should have still thought that a receipt of rent by the landlord would be an admission that the lease was subsisting at the time when the rent became due, and that he could not afterwards insist upon a forfeiture *previously* committed; and his lordship said, that to hold the contrary would be productive of great injustice, for it would enable a landlord to eject a tenant after he had given him reason to suppose that the forfeiture was waived, and after the latter had, on that supposition, expended his money in improving the premises. We must therefore look on this distinction between the possibility of waiving the breach of a condition which is to render the lease *void*, and that of one which is to render it *voidable*, as shaken; and indeed in *Roberts v. Davey*, 4 B. & Ad. 667, Sir W. Follett argued that it had been virtually overruled. Still there is no express decision to that effect, unless *Roberts v. Davey* be so considered; nor does it appear a necessary consequence, that, because the tenant is prevented from taking advantage of his own wrong by insisting that the lease is absolutely void, it shall therefore be taken to be only voidable when that construction makes for the tenant and *against* the landlord; and when we consider the high authorities adducible in support of the distinction in question, and their analogy to the cases in which

it has been determined that no acceptance of rent by a remainderman will confirm a lease void as against him, *Simpson v. Butcher*, Dougl. 51, *et notas*, *Jenkins v. Church*, Cowp. 483, we may conjecture that it will not be quietly allowed to become obsolete: and that further controversy may arise upon the question, whether the landlord in case of a stipulation that the lease shall become void on breach of a condition which has been broken, is precluded by a subsequent receipt of rent from treating the lease as determined. On that question the words of Lord Coke are express, that "*where the lease is ipso facto void by the condition, no acceptance of rent after can make it to have a continuance*," 1 Inst. 214; and see also the other authorities above cited. On the other hand, the case of *Roberts v. Davey*, is extremely strong. There, the person seeking to treat the licence as void was not the licensee nor any one connected with him in interest; he was not taking advantage of any wrong done by himself; nor was he enabling the licensee to do so, which differs the case from *Read v. Farr*, where the defendant, who sought to take advantage of the tenant's wrongful act, was connected with him in interest; so that (unless there be a difference between the right of a landlord to consider the lease absolutely void before any expression of his election, and that of a third party to

do so), *Roberts v. Davey* is no doubt an authority that it is only voidable in point of law, and with relation to all persons, including the landlord. And if the landlord as well as the tenant must treat it as voidable, no doubt the receipt of rent may operate as a waiver of the forfeiture. Perhaps the true rule may be ultimately held to be, that the effect of the proviso rendering the lease void is only to dispense with entry, and to substitute for it any formal expression of the lessor's election to avoid the lease. See *Bowser v. Colby*, 1 Hare, 109. On the question what is a sufficient entry where entry is requisite, see *Doe d. Hanley v. Wood*, 2 B. & A. 724; *Doe v. Pritchard*, 5 B. & Ad. 765; *Doe v. Williams*, *ibid*, 783. *Doe v. Glenn*, 1 A. & E. 49, 3 N. & M. 837, S. C., differently reported; *Turner v. Doe d. Bennett*, 9 M. & W. 646, per curiam; *Doe d. Bennett v. Woodroffe*, 10 M. & W. 608. [*Baylis v. Le Gros*, 4 C. B., N. S. 537.]

Although acceptance of rent falling due after a forfeiture operates as a waiver, yet acceptance after forfeiture of rent which became due before the forfeiture will not do so, [*Price v. Worwood*, 4 H. & N. 512; *Green's Case*, Cro. Eliz. 3; for there is no inconsistency in accepting rent due before the supposed determination of the estate, per Crompton, J., 4 B. & S. 337; 33 L. J., Q. B. 11; but *semble*, it is otherwise in the case of a distress, for that acknowledges a subsist-

ing tenancy, *ibid*; see Plowden, fo. 133, 14 ass. there cited; unless the statute of 14 Anne, extending the right to distrain for six months after the determination of the lease, applies to the case, and that statute may be thought not to apply to cases of forfeiture, see *Doe v. Williams*, 7 C. & P. 322. In ejectment for non-payment of rent brought under statutes requiring proof that there was no sufficient distress to countervail the arrears due, distress for rent due before breach of condition is not a waiver, for, as Lord Mansfield says, in *Brewer v. Eaton*, 3 Dougl. 230, it is made in order to complete the plaintiff's title given him by statute. See also *Cotesworth v. Spokes*, 10 C. B., N. S. 103, where in such a case distress for three quarters' rent was held a waiver as to the first two quarters]. The lessor [does not] waive his right to recover such rent in an action, although the words of the condition may be that the lessor shall have the premises again, "*as if the indenture of lease had never been made*." The proper construction of such a proviso being, that from the time of re-entry the lessor should have the lease again, as if the indenture had never been made." *Hartshorne v. Watson*, 4 Bing. N. C. 178.

It is conceived, that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of the forfeiture. It is only evidence of the election

of the lessor to retain the reversion and its incidents, instead of the possession of the land; and, as an election once made and expressed cannot be retracted (*quod semel placuit in electionibus amplius displicere non potest*, Co. Litt. 146, a; [see *Ward v. Day*, 4 B. & S. 337; 5 B. & S. 359; 33 L. J., Q. B. 3]), the receipt of subsequent rent as such, without more, binds the landlord by proving an election. But rent to the amount of that reserved in the lease may be received under circumstances showing it to be *paid* and accepted merely as compensation for use of the land, and not with the intention of setting up the lease; nay, a contrary intention may be expressed at the time of its receipt. A receipt of rent under such circumstances would not, it seems, amount to a waiver of the forfeiture. See *Doe v. Batten*, Cowp. 243. It is not supposed that the naked question of intention to waive would in such a case be left to the jury. The question should perhaps be, Did the lessor receive the rent *eo nomine as rent due under the lease*? See per Parke, J., *Doe v. Pritchard*, 5 B. & Ad. 776. A receipt of rent after the lessor has by some unequivocal act, such as bringing ejectment, expressed his election to treat the lease as void, cannot operate to revive it. *Jones v. Carter*, 15 M. & W. 718. See Co. Litt. 215, a, [and *e converso*, if the lessor have by such an unequivocal act, as for

instance by suing for rent due subsequently to the forfeiture, expressed his election to affirm the lease, he cannot afterwards treat the tenant as a trespasser. *Dendy v. Nicholl*, 4 C. B., N. S. 376. Mr. Justice Willes is mis-reported to have said in this case that the doctrine in the above paragraph has been exploded. The only recent authority on the subject is *Croft v. Lumley*, 5 E. & B. 648. In that case, which was an action of ejectment to recover the possession of the Opera House, the Court of Queen's Bench considered that the receipt by the lessor of money tendered to him as rent was in point of law the receipt of rent, and a waiver of a forfeiture which had (according to the view taken by that court of the facts) been previously incurred, although the lessor, both before the tender and on taking the amount, unequivocally expressed his intention to accept the money only as compensation for the use of the land; the court in coming to this decision applied to the case the rule *non quod dictum sed quod factum est in jure inspicitur*. The judgment in this case for the defendant was affirmed in the Exchequer Chamber and House of Lords (5 E. & B. 682; 6 H. of L. C. 672), but only on the ground that there had been in fact no forfeiture of the lease. In the House of Lords, where one of the questions submitted to the judges related to the point of waiver, eight out of the nine judges who attended were of opinion that, if there had been any forfeiture it had been waived by the receipt of the money which was offered as rent, and as rent only. But the peers who decided the case (Lords Cranworth and Wensleydale) were both of opinion that there had been no forfeiture of the lease, so that the question of waiver became immaterial, and Lord Cranworth observed that he gave no opinion upon this point. Lord Wensleydale, after questioning whether there had been any waiver, said that he thought that it was a question of fact, and not of law, whether the transaction in that case amounted to a payment and receipt of rent, and that he was led to suppose that it did not, as the money was not re-demanded when the lessee declared that he would only take it as compensation. His lordship appeared to be of opinion that the rule *solvitur in modo solventis* is only applicable to the case of a payment in respect of one of two debts. *Croft v. Lumley* cannot, therefore, be considered to have decided that, under such circumstances as existed in that case, a waiver must be held to have taken place, either as a matter of law or as a necessary inference of fact. There is no doubt that when there are two debts, and money is paid by the debtor on account of one of them, the payment discharges that debt, although at the time of taking the money the creditor says that he

receives it on account of the other. In an anonymous case, Cro. Eliz. 68, "the defendant being indebted to the plaintiff *upon bond*, and also *upon book*, for wares had of him, tendered the money due on the bond at the day, which the plaintiff accepted, and said it should be for the book debt, but the defendant said he paid it upon his bond, and not otherwise. The plaintiff crossed his book as discharged, and brought debt on the bond, but it was adjudged against him, for the payment is to be in the manner the defendant would make it, and not as the plaintiff would accept it." See also *Bois v. Cranfield*, Sty. 239; *Viner's Ab. Tit. "Payment," M. 1*].

There is some distinction, in respect of *waiver*, between a condition against underletting and one against assignment; for in the former case, if the lessee underlet and the lessor accept subsequently accruing rent, so as to waive the forfeiture, still, if the lessee, after the expiration of that term, make another under-lease, the lessor may re-enter, *Doe v. Bliss*, 4 Taunt. 735; but if the lessor were, by acceptance of rent, to waive the forfeiture incurred by the lessee's assignment, there would [have been, before the recent statutes referred to above, p. 34,] an end of the condition altogether, exactly as there would [have been] if he had licensed it. *Lloyd v. Crispe*, 5 Taunt. 249; 1 Wms. Saund. 288, note s. See 5 B. & Ad. 781.

And it has been thought that, even if the lessor were expressly to license the lessee to underlet, still the lessee might incur a forfeiture by making a fresh under-lease after the expiration of that licensed; for that the licence would in that case only operate as a suspension of the condition, and a condition may be *suspended*, though it [could not, before the recent statutes] be *apportioned*. 1 Wms. Saund. 288, note s.

The American courts have decided that a condition can only be destroyed by express licence, and that the waiver of a forfeiture by acceptance of rent or the like, operates *pro hac vice tantum*, and leaves the condition effectual for the future.

It need hardly be added that receipt of rent is no waiver of a forfeiture recurring by reason of a continuing breach of covenant. *Doe d. Baker v. Jones*, 5 Exch. 498. [Where a breach of covenant not to do a particular act without licence has continued for twenty years, and rent has been received throughout that period by the lessor, with full knowledge of the facts, a licence may be presumed. *Gibson v. Doeg*, 2 H. & N. 615.]

With respect to what will amount to a breach of such conditions—When the condition was "not to assign, transfer, set over, or otherwise do and put away the indenture of demise or the premises thereby demised, or any part thereof," an underlease was held

no breach of it, *Crusoe v. Bugby*, 3 Wils. 234; so, of an equitable mortgage, *Ex parte Drake*, 1 M. D. & De G. 539; *Doe v. Hogg*, 4 D. & R. 226; but a condition not to "set, let, or assign over the demised premises, or any part thereof," comprehends underleases: *Roe v. Harrison*, 3 T. R. 425; *Roe v. Sales*, 1 M. & S. 297; *Doe d. Holland v. Worsley*, 1 Camp. 20; and a covenant not to "let, set, or demise for all or any part of the term," assignments. *Greenaway v. Adams*, 12 Ves. 395. Letting lodgings was held by Lord Ellenborough not to be a breach of a condition not to underlet any part of the premises without the licence of his lessor, *Doe v. Laming*, 4 Camp. 73. [A deed of assignment in trust for creditors registered under the Bankrupt Act, 1861, s. 194, was held to work a forfeiture in *Holland v. Cole*, 1 H. & C. 67; S. C., 31 L. J., Exch. 481.] An assignment *by operation of law* is no breach of a condition not to assign, *ex. gr.*, if the lessee become bankrupt, or the lease be taken in execution, *Philpot v. Hoare*, 2 Atk. 219; *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Carter*, 8 T. R. 57, unless such an event be brought about by the fraudulent procurement of the lessee himself. *Doe v. Carter*, 8 T. R. 300. See *Doe v. Hawkes*, 2 East, 481. And in *Doe v. Powell*, 5 B. & C. 308, it was held, that an assignment, which was an act of bankruptcy, and was avoided by subsequent proceedings in bank-

ruptcy, did not, as against the assignees, create a forfeiture, and that the assignees took the lease notwithstanding the temporary breach of the condition against assignment. But the lessor may, if he please, by the insertion of express words for that purpose, provided they be clear and distinct, for the court will not be astute to find them a meaning, *Doe d. Wyndham v. Carew*, 2 Q. B. 317, render even such an assignment a forfeiture. *Roe v. Galliers*, 2 T. R. 133; *Davis v. Eyton*, 7 Bing. 154. See *Doe v. Hawkes*, 2 East, 481; *Doe v. Clarke*, 8 East, 185; *Doe v. David*, 5 Tyrwh. 125; *Cooper v. Wyatt*, 5 Madd. 482; *Yarmold v. Moorhouse*, 1 R. & Myl. 364; *R. v. Robinson*, Wightw. 386. And the landlord re-entering for such a forfeiture is entitled to the emblements and fixtures. *Davis v. Eyton*, 7 Bing. 154. Marriage does not operate as a forfeiture. *Anon. Moor*, 21. Whether a de- vise be a breach of the condition not to assign, has been disputed. *Fox v. Swann*, Styles, 483; *Dumpor v. Symons*, Cro. Eliz. 816; *Berry v. Taunt*, *ib.* 331. And see some observations in *Doe v. Bevan*, 3 M. & S. 353, and the argument in *Doe v. Evans*, 9 A. & E. 724. It has been thought that if executors and administrators be not expressly named in the condition, an assignment by them would not create a forfeiture. *Anon. Moor*, 21; *Seers v. Hind*,

1 Ves. jun. 295; but the mention of *assigns* includes administrators, for they are *assigns* in law. *Moor's Case*, Cro. Eliz. 26, [and *Thornhill v. King*, *ib.* 757]. See *Cox v. Browne*, Cha. Rep. 170. So are executors, *Wollaston v. Hakewill*, 3 Scott, N. R. 593; *Sleap v. Newman*, 12 C. B. N. S. 116; even *de son tort*, *Paull v. Simpson*, 9 Q. B. 365; [so also are mortgagees of leases, *Gilbraith v. Cooper*, 8 H. of L. Cases, 315. A mortgagor cannot, unless in case of estoppel, avail himself of a proviso for re-entry by him, *Saunders v. Merryweather*, 35 L. J. Exch. 115. In *Doe v. Bevan*, 3 M. & S. 353, it was held that the assignees of a bankrupt might assign, although *assigns* were named in the condition, but in that case the assignees were directed by an order of the Court of Chancery to sell the lease, and the decision was before *Copeland v. Stephens*, 1 B. & A. 593, which established that the general assignment of a bankrupt's personal estate under the commission did not vest a term of years in the assignees until their acceptance of it. The Bankrupt Law Consolidation Acts (12 & 13 Vict. c. 106, s. 145, and 24 & 25 Vict. c. 134, s. 131) give the assignees an election to accept or decline leases].

A *general* condition not to assign, inserted in a lease, to a man, "*and his assigns*," was considered in *Strickley v. Butler*, Hob. 170, to be void for repug-

nancy, though it was admitted that a condition against assignment to a particular person would, even in such case, be good. But the former part of the above doctrine has been denied. *Dennis v. Loring*, Hard. 427; and in *Wetherall v. Geering*, 12 Ves. 511, the Master of the Rolls said, that assigns would in such a case be taken to mean such assigns as the lessee might lawfully have, *viz.* by licence, and that there was no repugnancy. It is laid down, see Sheppard's Touchstone, 131, Co. Litt. 223, a, that in an assignment of the entire interest in a term already created, a condition against assignment is void.

A court of equity will not relieve against the forfeiture occasioned by breach of a covenant not to assign, for it could not place the parties *in statu quo*; and besides, such a forfeiture must always be incurred by the wilful act of the lessee, and cannot be the result of *accident*, which seems to be the true foundation on which equity supports itself when relieving against forfeitures. *Hill v. Barclay*, 18 Ves. 63; *Lovat v. Lord Ranelagh*, 3 V. & B. 31; *Davis v. Moreton*, 2 Cha. Ca. 127; see Maddock's Cha. Prac., 2nd. Edit., vol. 1, p. 31; [see *Bamford v. Creasy*, 1 Giff. 675; 7 L. T. N. S. 187]. It should seem, however, that even in cases of accidental neglect to fulfil a covenant to repair, such relief will not be given, *Gregory v. Wilson*, 9 Hare, 683.

SPENCER'S CASE.

PASCH. 25 ELIZ.—IN THE KING'S BENCH.

[REPORTED 5 COKE, 16.]

Covenants—What covenants run with the land.

SPENCER and his wife brought an action of covenant against Clark, assignee to J. assignee to S., and the case was such: Spencer and his wife by deed indented demised a house and certain land (in the right of his wife) to S. for term of twenty-one years, by which indenture S. covenanted for him, his executors and administrators, with the plaintiffs, that he, his executors, administrators, or assigns, would build a brick wall upon that part of the land demised, &c. S. assigned over his term to J., and J. to the defendant; and for not building of the brick wall the plaintiff brought the action of covenant against the defendant as assignee: and after many arguments at the bar, the case was excellently argued and debated by the justices at the bench: and in this case these points were unanimously resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, and the whole court. And many differences taken and agreed concerning express covenants, and covenants in law, and which of them would run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound, although he be expressly named, and where not.

2 Bulstr. 281,
282.
Comberb. 64.
Carth. 178.
Skinner 211,
297.
3 Wilson 27.
Cro. Jac. 459.

Moor 159.

1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the cove-

- nant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee (a), although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar the covenant concerns a thing which was not *in esse* at the time of the demise made (b), but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.
- (a) Moor 27, 399.
Cro. El. 457, 552, 553.
1 Rol. 521, 522.
Postea 24.
1 Sand. 239.
Cr. Jac. 125.
Cr. Car. 222, 523.
1 Jones 245.
1 Siderf. 157.
1 Anders. 82.
1 Show. 284.
4 Mod. 80.
3 Lev. 326.
Salk. 185, 317.
- (b) Cr. El. 457.
Cr. Car. 439.
Dyer 14, pl. 69.
1 Anders. 82.
Moor 159.

2. It was resolved that in this case, if the lessee had covenanted for him *and his* (c) *assigns*, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee: for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee *by express words*. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a (d) *Warrantia Chartæ*, F. N. B. 135. & 9 E. 2; *Garr' de Charters*, 30. 36 E. 3; *Garr'* 1. 4 H. 8; *Dyer* 1. But although the covenant be for him and his assigns, yet if the thing to be done be *merely collateral to the land*, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is
- (c) Cr. Car. 25, 188.
1 Jones 223.
1 Rol. Rep. 360.
Moor 159, 399.
- (d) F. N. B. 135. d.

merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

3. It was resolved, if a man leases (a) sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such (b) privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion (c), but merely a thing in action in the personalty, which cannot bind any but the covenantor (d), his executors or administrators, who represent him. The same law, if a man demise a house and land for years, with a stock or sum of money, rendering rent,† and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum (e), but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee. And it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted, or otherwise consumed or destroyed by the lessee, and therefore the law cannot determine, at the time of the lease made, that such covenant shall bind the assignee.

4. It was resolved, that if a man makes a feoffment by this word (f) *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch; but if a man makes a lease

(a) 2 Jones 152. 1 Leon. 43. Swinb. 324.

(b) Cr. Car. 188.

(c) 1 Leon. 43. [See *Garton v. Gregory*, Cam. Sac. 3 Best & Smith 90; S. C. 31 L. J. Q. B. 302; and further as to reversionary interest in chattels, *Mears v. S. W. Rail. Co.*, 11 C. B. N. S. 850; S. C. 31 L. J. C. P. 190; *Gordon v. Harper*, 4 H. & N. 438; *Lancashire Waggon Co. v. Fitzhugh*, 6 Hurlst. & N. 502; S. C. 30 L. J. Exch. 231.]

(d) Swinb. 324.

† See *Dean, &c. of Windsor v. Gover*, 2 Wms. Saund. 301. *Gardiner v. Williamson*, 2 B. & Ad. 336. *Lord Mountjoy's Case*, 5 Co. 4. *Jewel's Case*, ib. 3.

(e) Kelw. 153. b. 1 And. 4. *Dyer* 56. pl. 15. 16. 212. pl. 37. 257. 338. 21. E. 4. 29. a. 3 Bulst. 291. 9 E. 4. 1. b.

(f) 2 Inst. 275. 4 Co. 81. a. 1 Co. 2. b. Co. Lit. 384. a. Yelv. 139. Perk. Sect. 124.

(a) [8 & 9 Vict. c. 106, s. 4].
 4 Co. 81. a.
 Yelv. 139. Co.
 Lit. 384. a.
 Perk. Sect.
 124. Dall. 101.
 Cr. Jac. 73.
 2 Inst. 276.
 F. N. B. 134.
 h. Hob. 12. 1
 Vent. 44. 1
 Rol. 521.

for years by this word *concessi* (a) or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant: for the lessee and his assignee hath the yearly profits of the land, which shall grow by his labour and industry, for an annual rent; and therefore it is reasonable, when he hath applied his labour, and employed his cost upon the land, and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

5. Tenant by the courtesy, or any other who comes *in* in the *post*, shall not vouch (which is in lieu of an action).
 (b) 2 Roll. 743.

But if (b) a warrant be granted by deed to a woman who takes husband, and the woman dies, the husband shall vouch by force of this word *grant*, although he comes to it by act in law. So if a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute-merchant or statute-staple or *elegit* of a term, and he to whom a lease for years is sold by force of any execution shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law, as if a man grants to lessee for years, that he shall have so many (c) estovers as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come.

(c) 5 Co. 24. b.
 F. N. B. 181.
 a.

6. If lessee for years covenants to repair the houses during the term (d), it shall bind all others as a thing which is appurtenant, and goeth with the land, in whose hands soever the term shall come, as well those who come to it by act in law as by the act of the party, for all is one having regard to the lessor. And if the law

(d) 5 Co. 16. a.
 b. 5 Co. 24. b.
 Cr. Jac. 240,
 309, 439.
 1 Jones 223.
 Cr. El. 373.
 1 Sid. 157.

should not be such, great prejudice might accrue to him ; and reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee, should, on the other side, be bound by the like covenant when the lessee makes it with the lessor.

7. It was resolved that the assignee (*a*) of the assignee should have an action of covenant. So of the executors of the assignee of the assignee ; so of the assignee of the executors or administrators of every assignee, for all are comprised within this word (*assignees*), for the same right which was in the testator, or intestate, shall go to his executors or administrators ;* as if a man makes a warranty to one, his heirs and assigns, the assignee (*b*) of the assignee shall vouch, and so shall the heirs of the assignee ; the same law of the assignee of the heirs of the feoffee, and of every assignee. So every one of them shall have a writ of *Warrantia Chartæ*. *Vide* 14 E. 3, Garr. 33 ; 38 E. 3, 21 ; 36 E. 3, Garr. 1 ; 13 E. 1, Garr. 93 ; 19 E. 2, Garr. 85, &c. For the same right, which was in the ancestor, shall descend to the heir in such case without express words of the heirs of the assignees.

Observe, reader, your old books, for they are the fountains out of which these resolutions issue ; but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them. For example (*c*), in 42 E. 3. 3, the case is : grandfather, father, and two sons. The grandfather was seised of the manor of D., whereof a chapel was parcel ; a prior, with the assent of his covent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his covent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeoff one of the manor in fee, who gave it the younger son and his wife in tail ; and it was adjudged, that the tenants in tail as (*d*) terretenants (for the elder brother was heir), should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the

(*a*) 1 Roll. 521.
1 Roll. Rep.
81, 82.
2 Bulst. 281.
Owen 151, 152.

* [See *Sleap v. Newman*, 12 C. B., N. S. 116.]
(*b*) Cr. El. 534. Co. Lit. 384. b.

(*c*) Co. Lit. 384. a.
1 Roll. 520, 521. Br. Covenant 5, Statham, Covenant 3.

(*d*) Co. Lit. 385. a.
8 Co. 145. a.

- manor, as it is there said. And Finchden related that he had seen it adjudged, that two (a) coparceners made partition of land, and one did covenant with the other to acquit him of suit, which was due, and that coparcener to whom the covenant was made did alien, and the suit was arrear; and the feoffee brought a writ of covenant against the coparcener to acquit him of the suit; and the writ was maintainable, notwithstanding he was a stranger to the covenant, because the acquittal fell upon the land; but if such covenant were made to say divine service in the (b) chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in (c) 2 H. 4. 6, b. But there it is agreed that if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D., and inhabitants therein, the covenant shall be annexed to the manor, and there the terretenant shall have the action of covenant without privity of blood. *Vide* 29 E. 3, 48, and 30 E. 3, 14. Simpkin (d) Simeon's case, where the case was, that Lady Bardolf by deed granted a ward to a woman who married Simpkin Simeon, against whom the Queen brought a writ of right of ward, and they vouched the Lady Bardolf, and afterwards the wife died, by which the chattel (e) real survived to the husband (and resolved that the writ should not abate), the vouchee appeared, and said, what have you to bind me to warranty? The husband showed how that the lady granted to his wife, before marriage, the said ward; the vouchee demanded judgment for two causes.
- (a) 1 Roll. 521. Co. Lit. 384. b. 385. a. 42 E. 3. 3. b. Br. Covenant 5. 1 Roll. Rep. 81.
- (b) 1 Roll. 521.
- (c) Co. Lit. 385. a. Fitz. Covenant 13. Br. Covenant 17. F. N. B. 181. a.
- (d) Co. Lit. 384. a. 2 Roll. 743. 744. 3 Bulst. 165. Hob. 47. 1 Roll. Rep. 81. Cr. El. 436.
- (e) 1 Roll. 345. Co. Lit. 351. a.

(f) Co. Lit.
384. a. 161. b.

1. Because no word of warranty was in the deed; as to that it was adjudged that this word (f) (*grant*) in this case of grant of a ward (being a chattel real), did import in itself a warranty.

2. Because the husband was not assignee to the wife, nor privy. As to *that* it was adjudged that he should vouch, for this warranty implied in this word (*grant*), is in case of a chattel real so annexed to the land, that the

husband who comes to it by act in law, and not as assignee, should take benefit of it. But it was resolved by Wray, Chief Justice, and the whole court, that this word (*concessi* or *demisi*), in case of (a) freehold or inheritance, doth not import any warranty; 11 H. 6, 45, *acc'*.^{(a) Co. Lit. 384, a.}
Vide 6 H. 4; 12 H. 4, 5; 1 H. 5, 2; 25 H. 8; Covenant Br. 32; 28 H. 8; Dyer, 28; 48 E. 3, 22; F. N. B. 145; C. 146 & 181; 9 Eliz., Dyer, 257; 26 H. 8, 3; 5 H. 7, 18; 32 H. 6, 32; 22 H. 6, 51; 18 H. 3; Covenant, 30; Old N. B. Covenant, 46 H. 3, 4; 38 E. 3, 24. See the statute of (b) 32 H. 8. c. 34.
 extend to covenants which touch or concern the thing demised, and not to collateral covenants.^{Moore 159. Cr. Jac. 523. 2 Bulst. 281, 282, 283. Stile 316, 317.}
 1 Sand. 233, 239. Cr. Car. 25, 222. Anders. 82. 2 Jones 152. Owen 152. Co. Lit. 215. a.

THIS is the leading case referred to upon every question whether a particular covenant does or does not run with particular lands, or a particular reversion.

A covenant is said to run with land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant is said to run with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion.

Questions upon this branch of the law generally arise between the lessor of lands or his assignee, and the lessee thereof or his assignee; and we will, therefore, chiefly consider the subject with reference to persons holding those characters before inquiring into

it with reference to persons not occupying those relations to each other.

An opinion has sometimes been intimated, that there were, even at common law, some covenants which ran with the reversion. The authorities, however, seem to preponderate in favour of the doctrine of Serjeant Williams, who, in *Thursby v. Plant*, 1 Wms. Saund. 240, n. 3, says that "the better opinion seems to be, that the assignee of the reversion could not bring an action of covenant at common law." And the cases will be best reconciled, and the whole subject rendered far more intelligible, if we adopt the view taken by the learned and eminent personages who have since edited that work, vol. 1, 240 a, note o. viz. "that at common law covenants

gran with the land, but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not." [See *Butler v. Archer*, 12 Irish C. L. 104, judgment of Lefroy, C. J.]

Such being the state of the common law, st. 32 H. 8, cap. 34, after reciting among other things, "that by the common law, no stranger to any covenant could take advantage thereof, but only such as were parties or privies thereunto," proceeded to enact "that all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king of any lands or other hereditaments, or of any reversion in the same, which belonged to any of the monasteries, &c., dissolved or by any other means come to the king's hands, since the 4th day of February, 1535, or which at any time before the passing of this act belonged to any other person, and after came to the hands of the king, and all other persons being grantees or assignees to or by the king, or to or by any other persons than the king, and their heirs, executors, successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns, by entry, for non-payment of the rent, or for doing waste or other forfeiture, and, by action only, for not performing other conditions, covenants, or agreements,

expressed in the indentures of leases and grants against the said lessees and grantees, their executors, administrators, and assignees, as the said lessors and grantors, their heirs, or successors, might have had."

Section 2 enacted, "that all lessees and grantees of lands, or other hereditaments, for terms of years, life or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other persons of the reversion of the said lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs, and successors."

Leases not under seal are not within the meaning of this statute. *Brydges v. Lewis*, 3 Q. B. 603; *Standen v. Christmas*, 10 Q. B. 135. And the remedy upon the stipulations contained in them is by action in the name of the original stipulator, *Bickford v. Parsons*, 5 C. B. 921.

Although the words of this act are very general, and taken literally would comprehend every covenant expressed in the lease; yet it is settled, as we are informed in the principal case *ad finem*, that it extends only to covenants which touch and concern the thing de-

mised, and not to collateral covenants. See also *Webb v. Russell*, 3 T. R. 402; 1 Inst. 215, b.; Shepp. Touch. 176. It is also settled that an assignee of part of the reversion, *e. g.* for years, is an assignee within the meaning of the act, 1 Inst. 215, a. *Kidwelly v. Brand*, Plowd. 72; *Wright v. Burroughes*, 4 Dowl. & L. 438; 3 C. B. 684, S. C.; and so also is the assignee of the reversion in part of the land, as far as covenants are concerned, *Twynam v. Pickard*, 2 B. & A. 105; *Simpson v. Clayton*, 4 Bing. N. C. 758, 780; 6 Scott, 469, S. C.; though [generally] he is not so for the purpose of availing himself of conditions, for they cannot be apportioned by the act of the party: see *Dumpor's Case*, *ante*, and the notes thereto; and see *Doe d. B. de Rutzen v. Lewis*, 5 A. & E. 277. [Now, where the reversion on a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion has, in respect of his portion of the rent or reservation, the benefit of all conditions of re-entry for non-payment, in the same manner as if the condition had been reserved to him as incident to his part of the reversion in respect of the apportioned rent so allotted to him. See the 22 & 23 Vict. c. 35, s. 3.] The assignee of the term in part of the land is within the statute, *Palmer v. Edwards*, Doug. 121; *Twynam v. Pickard*, the judg-

ments, 2 Wms. Saund. 181 d.; [so is the assignee of the reversion into which a share of the term has merged, *Buddleley v. Vigurs*, 4 E. & B. 71; and the assignee of some of the joint tenants of a term where the covenant is joint and several, *Norval v. Pascoe*, 34 L. J. Cha. 82]. A grantee of the reversion in copyhold lands is also an assignee within the meaning of the statute, *Glover v. Cope*, 3 Lev. 326; *Skinner*, 305, S. C.; *Whitton v. Peacock*, 3 Myl. & K. 325; and where lands were devised to A. for life, remainder to B. for life, with power to A. to make leases, and A. made a lease to C. and died during the term demised, it was held that B. should sue upon the covenants. *Isherwood v. Oldknow*, 3 M. & S. 382. (See, too, *Rogers v. Humphrey*, 4 A. & E. 299.) "The question," said Le Blanc, J., "is—*Is the plaintiff an assignee?* He is the person next in remainder to the person granting the lease; true he is not assignee of the lessor, he is assignee of the devisor. But I take it to be clear that the lease must be considered as emanating from the person who creates the power, and that it derives its force and authority from him. The argument is, that he cannot have this action because he must be assignee of the person of the lessor or grantor. But he is the assignee of the person who, in the eye of the law, is the lessor: because the person empowering the tenant for life to

grant the lease is, in the eye of the law, the lessor. The doctrine of Lord Coke in *Whitlock's Case* entitles the court to say upon principle that this plaintiff was the assignee of him who, in contemplation of law, was the lessor, and that as such he is entitled to this action." [See also *Greenaway v. Hart*, 14 C. B. 340.] It seems, that a tenant from year to year who demises by indenture for a term of years however long, has by reason of the possibility of his estate continuing longer than the demised term, a reversion with which the benefit of the covenants in the indenture may pass to an assignee during the existence of the tenancy from year to year. *Oxley v. James*, 13 M. & W. 209. Both the benefit and burden of covenants, therefore, now run with the reversion from assignee to assignee, in the same manner that they ran at common law from assignee to assignee, of the land. In order, however, that the covenants might continue available for the benefit of the reversioner, it was held to be absolutely necessary that he should continue to be seised or possessed of the same reversion to which the covenants were incident; for, if it happened to be merged by his becoming the owner of some other reversion in the same land, the covenants were altogether gone. Thus in *Moor*, 94, a person made a lease for 100 years, the lessee made an underlease for 20 years, rendering rent, with a clause of re-entry; afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term. It was held that the grantee should not have either the rent or the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee; see also *Webb v. Russell*, 3 T. R. 402, *Wootton v. Steffenoni*, 12 M. & W. 132, where Parke, B., puts the question—If tenants in common demise their undivided interests, and there is a joint covenant with both, will that run with the reversion? [The answer to which is, that it will, but with the entire reversion only, *Thompson v. Hakewill*, 19 C. B. N. S. 713, S. C., 35 L. J. C. P. 18.] One of the consequences of the above doctrine was, that when lands were leased with a stipulation for renewal, and the lessee accepted a new lease, his remedies for rent and on the covenants contained in any underlease he might have made were completely gone, since the reversion was destroyed to which they were incident. To obviate these evils, st. 4 G. 2, c. 28, s. 6, enacted, that in case any lease shall be surrendered, in order to be renewed, the new lease shall be as valid, to all intents, as if the underleases had been likewise surrendered before the taking of the new lease; and that the remedies of the lessees, against their undertenants shall

remain unaltered, and the chief landlord shall have the same remedy by distress and entry for the rents and *duties* reserved in the new lease, so far as the same exceed not the rents and *duties* reserved in the former lease, as he would have had in case such former lease had been still continued. See on the construction of this latter provision, *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715. Note that in Aley 39 it is said that a covenant is not a *duty*. The loss of the reversion by *merger* has now, however, in certain cases, ceased to operate as an extinguishment of the rent and covenants, *st. 8 & 9 Vict. c. 106*, s. 9, having enacted "that when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the first day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease." See the previous act, now repealed, 7 & 8 Vict. c. 76, s. 12. [As to when the Courts of Chancery will regard a lease as still subsisting notwithstanding legal merger

of it, see *Brandon v. Brandon*, 31 L. J., Cha. 47.]

Let us now see what covenants have been decided to *relate to*, or, in the words of the text, *touch and concern, the land*, in such a way that their benefit or burden is capable of running with it. On this subject it may be laid down as a general rule, that all *implied* covenants run with the land. Thus it was resolved in *Spencer's Case*, 4th resolution, "that if a man makes a lease for years by the word *concessi*, or *demisi*, which implies a covenant, if the assignee of the lessee be evicted he shall have a writ of covenant." (Since the 7 & 8 Vict. c. 76, sec. 6, 8 & 9 Vict. c. 106, sec. 4, *concessi* does not imply a covenant; ["*demisi*" still does one of *quiet enjoyment*, *Bandy v. Cartwright*, 8 Exch. 913; and *Penfold v. Abbott*, 32 L. J. Q. B. 67].) Whether a particular *express* covenant sufficiently "*touches and concerns the thing demised*," to be capable of running with the land, is not unfrequently a question of difficulty. The following, however, certainly do so. For *quiet enjoyment*, *Noke v. Awdler*, Cro. Eliz. 436; *Campbell v. Lewis*, 3 B. & A. 392. *Further assurance*, *Middlemore v. Goodale*, Cro. Car. 503; *Renewal*, *Roe v. Hayley*, 12 East 464; *Simpson v. Clayton*, 4 Bing. N. C. 758. *To repair*, *Dean and Chapter of Windsor's Case*, 5 Rep. 24, and the principal case. [To put in repair, *Martyn v. Clue*, 18

Q. B. 661.] To leave possession peaceably to the lessor and his assigns, or to leave in good repair. Vin. Abr. Covenant K. 19 [*Martyn v. Clue*, *ubi supra*]. Parke, B., in *Doe d. Strode v. Seaton*, 2 C. M. & R. 730 (see the report of the same case in Tyr. & Gr. 19), was speaking of a case where the reversion had determined, and did not intend to express a doubt that the covenant was one of which, had the reversion continued, the assignee of the reversion might have taken advantage. To discharge the lessor *de omnibus oneribus ordinariis et extraordinariis*, *Dean and Chapter of Windsor's Case*, 5 Rep. 25. To permit the lessor to have free passage to two rooms excepted in the demise, *Colé's Case*, 1 Sal. 196, reported as *Bush v. Cales*, 1 Show. 389; Carth. 232. To cultivate the lands demised, in a particular manner, *Cockson v. Cock*, Cro. Jac. 125. To reside on the premises, admitted by the Court in *Tatem v. Chaplin*, 2 H. Bl. 133. See 1 Rolle Abr. 521 (*l*), and see the cases cited in the note to *Hinde v. Gray*, 1 M. & Gr. 208. Not to carry on a particular trade, *Mayor of Congleton v. Pattison*, 10 East 136. A covenant to keep buildings within the bills of mortality insured against fire was in *Vernon v. Smith*, 5 B. & A. 1, held to run with the land, for st. 14 G. 3, c. 78, enabled the landlord to have the sum insured employed in reinstating the premises, so that the

covenant, with the aid of the statute, amounted to a covenant to repair. In *Vyvyan v. Arthur*, 1 B. & C. 415, the lessee covenanted to grind at the lessor's mill, called *Tregamere Mill*, all such corn as should grow upon the close demised. This covenant was, in an action brought by the devisee of the lessor against the administratrix of the lessee, held to run with the land, at all events so long as the mill remained the property of the reversioner. In *Easterby v. Sampson*, 9 B. & C. 505, and 9 Bing. 644, where an undivided third part of certain mines was leased, and the lease contained a covenant by the lessee that he would build a new smelting mill, and keep it in repair for working the mines, this covenant was held first by the King's Bench, and afterwards in the Exchequer Chamber, to run with the [reversion]. In *Hemmingway v. Fernandes*, 13 Sim. 228, A. agreed to make a lease of certain land to B., who was the lessee of a colliery, B. covenanting for himself *and his assigns* to make a railway over the land, and to carry thereon all coal gotten out of the colliery, or any other land in the same township, that should be intended for shipment or water sale, paying for the carriage 2*d.* per ton. B. made the railway and afterwards assigned his interest in the land agreed to be demised and the colliery to C., who also worked other collieries in the township. The Vice-Chan-

cellor is reported to have held that the case fell within the second resolution in *Spencer's Case*, and that the covenant ran with the land, and bound the assignee.

The latter part of the first resolution in *Spencer's Case*, namely, that if assigns be not expressly mentioned, they are not bound by covenants relating to things not in existence at the time of the lease, was acted upon in *Doughty v. Bowman*, 11 Q. B. 444. [Lately, however, the Court of Exchequer, in a considered judgment (*Minshull v. Oakes*, 2 H. & N. 793), has not only expressed an opinion that this well-known rule is unreasonable, but has also suggested that *Spencer's Case* itself decided the contrary. The point is as curious as it is important, and requires to be considered at some length. In *Minshull v. Oakes* the court, after referring to other authorities upon the first resolution, proceeded to say,—“On the other hand, Moore, p. 159, pl. 300, which is evidently *Spencer's Case*, though the date is later, gives the decision the other way. The explanation may be that Lord Coke is reporting a variety of arguments and opinions expressed, while Moore gives the ultimate decision. *Smith v. Arnold*, 3 Salk. 4, is directly contrary; and in *Bally v. Wells*, 3 Wils. 25, the contrary is stated. No reason is given for the alleged difference between where the assignee is and is not named; on the contrary, the reason given for

binding in any case an assignee not named, viz., that he takes the benefit and burthen, seems equally to apply to every such case.”

First, with regard to this anonymous case in Moore, p. 159. The following is a translation of the important part of that report:—“In the same term” (Hill. 26 Eliz.) “*Gawdy* moved on the statute of 32 H. 8, whether, if lessee for life” (it will be observed that in *Spencer's Case* the lease was by Spencer and his wife for twenty-one years) “covenants for himself, his executors and administrators, to build a wall during his term, and then he assigns over his estate, the grantee of such reversion or the grantor shall have covenant against the assignee; and they all agreed that he should: for *Meade* said that the statute is that the grantees shall have the like remedies by entry or actions against the assignees, &c., as they ought to have had against the lessees themselves. And notwithstanding that the covenant wants the word *assigns*, yet each assignee, by the acceptance of possession, has made himself liable to all covenants concerning the land, but not to collateral covenants; and covenants to repair or build walls or houses are covenants inherent to the land, with which the assignee shall, without special words, be charged.”

Now, however like this case may be to *Spencer's*, it seems impossible that it can be the same:

for, in the first place, *Spencer's Case* was in the Queen's Bench, whereas the case reported in Moore must have been in a different court, inasmuch as *Meade*, the only judge there mentioned, was a judge of the Court of Common Pleas, and the *Gawdy* there mentioned is doubtless the Serjeant *Francis Gawdy* who was then practising in that court, and who was a younger half-brother of Sir *Thomas Gawdy*, one of the judges of the Queen's Bench before whom *Spencer's Case* was argued. See Dugdale, Orig. Judic. 48; Chronica Series 94, 95; Moore, 123, pl. 269; 242, pl. 381; Cro. Eliz. 24; Foss' Judges of England, vol. 6, p. 158. (These half-brothers had been curiously enough both christened *Thomas*, but the younger, who became in the reign of James the 1st, Chief Justice of the C. P., changed his name to *Francis*, at his confirmation, in the reign of Hen. the 8th. See Co. Lit. 3 a. Foss, *ubi supra*.) In the next place, in the case in Moore the question for the court was upon the 32 Hen. 8, c. 34; but in *Spencer's Case* such a question could not arise, since that statute only applies where the reversion on a lease has been assigned; and in *Spencer's Case* the action was brought by the original lessors; hence it is that Lord Coke only notices the statute in a few words at the end of his report. Moreover, when it is considered that *Spencer's Case* is

cited, within a comparatively short period after its occurrence, from Lord Coke's report of it, and never, it is believed, from Moore (see *Altos v. Hemmings*, 2 Bulst. 281, 12 Jac. I., before Lord Coke himself when Chief-Justice of the King's Bench, where *Spencer's Case* is referred to both in the argument and in the judgment; also *Smith v. Simonds*, Comberb. 64, 3 Jac. II.) it is difficult to believe that Lord Coke either misreported the case, or that, in any part of his elaborate report of the several resolutions, he is only giving "a variety of arguments and opinions expressed" during the discussion, and not the ultimate decision.

Adopting, then, the view which was taken in *Bally v. Wells*, 3 Wils. 32, that the two reports are of conflicting decisions in different cases, the correctness of the decision in Moore, 159, may next be considered. If, as *Meade, J.*, said, the statute gave the reversioner the like remedy against the assignees as he ought to have had "*against the lessees themselves*," instead of giving to him, as it does, only the like remedy *as the lessor or grantor himself* ought to have had against the *lessees or their assigns*, the judgment would have been undoubtedly correct; but, in fact, the statute does not touch the point.

It may also be remarked, that in the same reign (38 Eliz.) the Court of Queen's Bench sitting in

error held an unnamed assignee liable to repair a house, adopting the very distinction drawn in the first resolution in *Spencer's Case*, namely, that the covenant was for the maintenance of a thing *in esse* at the time of the demise. See the note of the case in Rolle's Ab. Tit. Covenant, L. 2.

Of the two other cases cited by the learned barons in opposition to *Spencer's Case*, it may be sufficient to say, with reference to *Smith v. Arnold*, 3 Salk. 4, that the third volume of Salkeld has never been considered to be of any authority (Wallace on the Reporters, 3rd edition, 247, 248, and observe the report itself); and with reference to *Bally v. Wells*, 3 Wils. 25, that instead of containing anything in derogation of *Spencer's Case*, the court there said, on comparing it with the case in Moore, "We rather choose to adhere to Lord Coke's authority, that such a covenant will not bind the assignee unless he be named."

Having called attention to the state of the authorities, it must be observed that the reasoning of the Court of Exchequer in *Minshull v. Oakes* does not appear to reduce any portion of the resolutions in *Spencer's Case* to an absurdity. With all submission, Lord Coke *does* give a reason "for the alleged difference between where the assignee is and is not named" in those cases in which the covenant relates to a thing not *in esse*

at the time of the contract; for he explains, in the first resolution, that where, in these cases, the assignee is not named, the law cannot annex a covenant to a thing which hath no being; and further, Lord Coke *does not* give as a reason "for binding in any case an assignee not named, that he takes the benefit and burthen of the contract." He gives indeed (in the second resolution) as one of the reasons for binding assignees who *are* named upon covenants relating to things not *in esse* at the time of the contract, that they take the benefit of it; but whether this be or be not a sufficient reason for holding that named assignees are liable in these cases (a liability which has never been doubted), it clearly cannot be a sufficient reason for holding that unnamed assignees are bound by such covenants, if, as Lord Coke explains, in the earlier resolution, the law cannot, the contract being silent, annex a covenant to a thing which hath no being.

It may further be remarked, that if Lord Coke *had* given as a "reason for binding in any case an assignee not named, that he takes the benefit and burthen" of the contract, this reason does not seem equally to apply to the case of assignees who simply receive the benefit of a thing which they find made for them upon the demised premises, and to those cases in which, in order to enjoy the benefit of the thing which is the subject

matter of the covenant, they will have themselves to construct it. In the latter cases, it may seem quite reasonable to hold them not bound to do so, unless the lease gives them clear notice of the intention to bind them, the covenant being, on the face of it, made on their behalf. Unless, then, the law laid down by Lord Coke can be deemed to be shaken by such authorities as the anonymous case in *Moore and Smith v. Arnold*, all the resolutions in *Spencer's Case* may still be considered to be law, and it may be regretted that any doubt should have been cast on their correctness.

In *Minshull v. Oakes* the court ultimately held that, under a lease of existing buildings, which gave to the lessee and his assigns liberty to construct additional buildings upon the demised premises, a covenant, not expressed to be made for assigns, to repair the buildings demised, and also those which might be erected during the term, bound the assignee to repair not only the buildings *in esse* at the time of the demise, but also those which had been erected subsequently. This decision appears to be inconsistent with the first resolution in *Spencer's Case*, unless any distinction can be rested on the fact that in *Minshull v. Oakes* the covenant to repair was clearly binding upon the assignee so far as related to the buildings in existence at the time of the demise.]

The liability of the *lessee* to be sued on his *express* covenants, is not determined by his assigning over his term and the lessor's acceptance of his assignee. *Barnard v. Godscall*, Cro. Jac. 309; *Thursby v. Plant*, 1 Wms. Saund. 240, *et notas*; but he may be sued on them either by the lessor, or if he have assigned, by his assignee; *Brett v. Cumberland*, Cro. Jac. 521, 2; and so may his personal representative having assets, *ibid.* *Hellier v. Casbard*, 1 Sid. 266; 1 Lev. 127; *Coghill v. Freelove*, 3 Mod. 325; 2 Vent. 209; *Pitcher v. Tovey*, 4 Mod. 76; and the notes to *Thursby v. Plant*, 1 Wms. Saund. 241. But though the lessee may, after he has assigned and his assignee has been accepted, be sued on his *express* covenants, it is said he cannot be so on his *implied* ones. *Batcheleur v. Gage*, 1 Sid. 447; Sir W. Jones, 223; see *Mills v. Auriol*, 4 T. R. 98; 1 Wms. Saund. 241, *in notis*; *Williams v. Burrell*, 1 C. B. 402. *Sed quære de hoc*. Nor will any action of covenant lie against the assignee of the lessee, except for breaches of covenant, happening while he is assignee, and therefore an assignee may get rid of his future liability by assigning even to a mere pauper. *Taylor v. Shum*, 1 B. & P. 21; *Le Keux v. Nash*, Str. 1222; *Odell v. Wake*, 3 Camp. 394; *Onslow v. Corrie*, 2 Madd. 330; though not of his liability for breaches already committed during the continuance of his in-

terest, *Harley v. King*, 5 Tyrwh. 692.

It has been made a question whether, in cases in which the right of action is given to the assignee by 32 H. 8, c. 34, the original covenantee may not still sue. The better opinion is, that he cannot. See *Beeley v. Purry*, 3 Lev. 154, where the point was however not decided. It appears to have been taken for granted in *Green v. James*, 6 M. & W. 656. And the cases which have settled that the statute transfers the privity of contract, militate strongly against the existence of any right in the original covenantee. See *Thursby v. Plant*, 1 Wms. Saund. 240; *Conran v. Pedder*, 2 I. C. L. R. 200.

Here may be noticed the remarkable case of *Wakefield v. Brown*, 9 Q. B. 209, in which a covenant to repair and paint was made by the lessee with the lessor, the lessor's landlord, and another party to the deed, who had, and appeared by the lease to have, no estate in the land either in fact or by estoppel. The lease having been assigned, an action was brought for breach of covenant against the assignee of the lessee, by the lessor and his superior landlord, who had survived the other covenantee. The question principally discussed in the judgment, namely, whether both the covenantees could join in the action, turned upon the construction of the covenant, and did not

relate to the subject of this note. The other question, which seems to have attracted less attention, was, whether inasmuch as one, if not two, of the covenantees had no estate in the reversion expectant upon the lease containing the covenant, that covenant could run with the land so as to bind the assignee of the lessee. This latter question, if free from authority, should seem to admit of an easy solution, because, by the common law, as we have seen, and shall presently still further observe, except in the case of landlord and tenant, the burden of covenants does not run with the land, though the benefit does; and in order to make the benefit of a covenant run with the land at the common law, it must be entered into with a person having an estate in the land, and when so entered into only enures during that estate; whilst the statute only deals with actions by the assignee of the reversion against the lessee or his assignee, and actions by the lessee or his assignee against the assignee of the reversion; and not with actions by the lessor against the assignee of the lessee, or *e contrâ*, which actions seem therefore to be governed by the common law. The Court of Queen's Bench, however, held the action maintainable, and upon this point gave judgment in the following words: "The other objection, *that there is no privity of estate*, is certainly not tenable. A covenant to repair

and paint clearly runs with the land, and there is privity of estate *between the defendant and one of the plaintiffs* at all events." The reference in this judgment to the existence of privity of estate between the parties to the action, or any of them, as being important to the decision of the question is somewhat perplexing; privity of estate between the original parties and those who either claim under them, or are sought to be charged with the burden which they have created, appearing alone to be material, either at the common law or under the statute. The court, indeed, appear to have either overlooked or disregarded the circumstance that the covenant was with the reversioner and a person having no estate, jointly; a sort of covenant which, it is submitted, does not run with the land, but is collateral, and so the assignee of the lease not liable upon it. In *Magnay v. Edwards*, 13 C. B. 479, under similar circumstances, the Court of Common Pleas, in deference to the authority of *Wakefield v. Brown*, gave judgment for the plaintiff, expressly guarding themselves, however, from being supposed to concur in the reasons upon which the judgment in that case proceeded.

Next, as to covenants running with the lands in other cases than those between landlord and tenant. These may be divided into the two following classes:—

1. Covenants made *with* the

owner of the land to which they relate.

2. Covenants made *by* the owner of the land to which they relate.

With respect to the former of these classes, *viz.* covenants made *with* the owner of the land to which they relate, there seems to be no doubt that the benefit, *i. e.* the right to sue on such covenants, runs with the land to each successive transferee of it, provided that such transferee be in of the same estate as the original covenantee was. Of this description are the ordinary covenants for title; see *Middlemore v. Goodale*, 1 Rolle's Ab. 521; K. Pl. 6 Cro. Car. 503, 505; Sir W. Jones, 406; Shepp. Touch. 171; *Kingdon v. Nottle*, 4 M. & S. 53; *Campbell v. Lewis*, 3 B. & A. 392; *Lewis v. Campbell*, 8 Taunt. 715; which latter case, as well as *Noke v. Auder*, Cro. Eliz. 373, 436, shows that there is no difference between the right of an assignee of freehold, and that of the assignee of a chattel real, to sue on covenants running with the land. Of this description also is the case of the Prior reported in the text, that of the two Coparceners, and the anonymous case in Moore, 179, cited by Littledale, *arguendo*, in *Milnes v. Branch*, 5 M. & S. 417, [and *Sharp v. Waterhouse*, 7 E. & B. 816].

In all these cases the covenant is for something relating to the land, and the assignee of the land is the person entitled to sue upon

it. See *Middlemore v. Goodale*, 1 Rolle's Abr. 521; *Spencer v. Boyes*, 4 Ves. 370.

When such a covenant is made, it seems to be of no consequence, whether the covenantor be the person who conveyed the land to the covenantee, or be a mere stranger. Thus in the Prior's case reported in the text, and in Co. Litt. 384, b, the Prior was a stranger to the land of the covenantee; and there is a good reason for this assigned in the above passage in Co. Litt., where the law is said to be so, *to give damages to the party grieved*; in other words, in order that the person who is injured by the non-performance of the covenant, who is always the owner of the land *pro tempore*, may be also the person entitled to the remedy upon it by action. Indeed, *Middlemore v. Goodale*, *Noke v. Awder*, and *Campbell v. Lewis* above cited, were all cases in which the covenantor was also the person who conveyed the land to the covenantee; and Sir Edward Sugden, in the law of *Vendors and Purchasers*, [p. 474 *et seq.*, 13th ed.], expresses an opinion, that to enable the assignee of land to take advantage of covenants they must have been entered into by a prior owner thereof. This, however, is contrary to the Prior's case in the text, contrary to the case of the Coparceners, contrary also to the anonymous case in Moore, 179, and to the opinion of the Real Property Commissioners,

expressed in their 3rd report; and Sir Edward Sugden himself declares that the consequences of applying such a doctrine to covenants entered into by a vendor, who is often only a mortgagor, or *cestuy que trust*, would be most alarming. See a learned note in "Jarman's Bythewood," vol. 7, pages 572, 3, vol. 9, page 354, of Mr. Sweet's edition.

It would be wrong to omit mentioning that, since the publication of the first edition of this work, a case occurred in the Court of Exchequer, bearing in some degree upon the above proposition. The case alluded to is *Raymond v. Fitch*, 5 Tyrwh. 985, in which the question was, whether the executors of one who had demised land, *excepting the trees*, (the circumstance that the trees were excepted does not appear in the statement of the case, but is to be collected from the observations of the counsel and judges. See page 991 *ad finem*, and the judgment,) could sue upon a covenant not to fell or lop them, which had been broken during the testator's lifetime. It was argued on behalf of the defendant, that where a covenant runs with the land and descends to the heir, there, though there may have been a formal breach in the testator's lifetime, still, if the substantial damage happened after his death, the real, not the personal, representative ought to be plaintiff. See *Kingdon v. Nottle*, 1 M. & S. 355; 4

M. & S. 53; *King v. Jones*, 5 Taunt. 418; [and *Goodman v. Boycott*, 2 B. & S. 1; S. C., 31 L. J., Q. B. 69]. Lord Abinger, however, delivering the judgment of the court, distinguished those cases by saying, "There is no doubt that the covenant here is *purely collateral, and does not run with the land*:" and he added, "for the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grew could not sue." His lordship does not state whether he based this opinion on the ground that the covenant not to cut down the trees did not sufficiently *touch and concern the land*, or whether, on the ground that the benefit of a covenant made by a stranger (which the lessee was *quoad* the trees) was incapable of running with the land to which it related, to the heir or devisee thereof. The point was not necessary for the decision of the case before their lordships, for the court appears to have been of opinion that the loss of the shade and casual profits of the trees during the testator's lifetime was a sufficient injury to the personal estate to vest a right of action in his executor; and it seems unfortunate, therefore, that the *dicta* in the case should have tended to cast any additional doubt on a doctrine so highly reasonable as that the right of action upon a covenant touching and benefiting the land, shall devolve along with

the land itself to each successive owner.

But though it be not necessary that the covenantor should be in anywise connected with the land, it is absolutely essential that the covenantee should, at the time of the making of the covenant, have the land to which it relates. On this point the text is express, *viz.* "If the covenant were to say divine service in the chapel of *another*, there the assignee shall not have an action of covenant, *because the chapel doth not belong to the covenantee*; as it is adjudged in 2 H. 4, 6. b."; see Co. Litt. 384, b., 385, a.; and *Webb v. Russell*, 3 T. R. 393. In such a case, however, the covenantee may sue though his assignee cannot. *Stokes v. Russell*, 3 T. R. 678.

It has been above stated, that, in order that the assignee may sue on such a covenant, he must be in of the same estate in the land which the party had with whom the covenant was originally made, for the covenant is incident to that estate. This rule might possibly be productive of very serious and disagreeable consequences; for when lands are conveyed (as has repeatedly been done for the purpose of barring dower) *to such uses as A. shall appoint, and in default of appointment to A. for life, remainder to B. his executors and administrators during the life of A., remainder to A. in fee*, and A. exercises the power of appointment in favour of a purchaser,

that purchaser comes in paramount to A. and above the estate of which he was seised, which is defeated by the exercise of the power as if it never had existed. There is consequently no sameness of estate between A. and the purchaser, which latter will therefore not be entitled to the benefit of covenants entered into with A., since those covenants were incident to the estate which has now been defeated by the appointment: see *Roach v. Wadham*, 6 East, 289. To obviate this evil, it is now usual, whenever the conveyance transfers a seisin to serve uses,—as, for instance, when it is by way of feoffment, or lease and release,—to enter into the covenants with the feoffee or releasee to uses, and his heirs, the consequence of which is believed to be, that the benefit of the covenants, being annexed to the seisin, is transferred to, and in a manner executed in, the various persons who become from time to time entitled under the uses which that seisin serves. See Sugd. Gilb. U. 186, *note*.

With respect to the second of the above two classes, namely, covenants entered into *by* the owners of land, great doubt exists whether these in any case run with the lands, so as to bind the assignee of the covenantor. One inconvenience which would be the result of holding them to do so is, that the assignee would frequently find himself liable to contracts of the very existence of which he

was ignorant, and which perhaps, would have deterred him from accepting a conveyance of the land, if he had known of them; and the reason assigned in the first Institute for allowing the *benefit* of a covenant relating to land to run therewith, *viz.* to give the remedy to the party grieved, does not apply to the question respecting the *burden* thereof. This question might have arisen in *Roach v. Wadham*, 6 East, 289. There *John Russ* being seised of an undivided third part of a certain messuage, and the plaintiffs of the two other undivided third parts, they conveyed the whole to *Coates* and his heirs, to such uses as *Watts* should appoint, and, subject thereunto, to the use of *Watts* in fee, “yielding and paying, and the said *William Watts*, and by his direction the said *T. Coates*, did and each of them did, grant out of the said messuage to the plaintiffs, their heirs and assigns, for ever, the yearly fee farm rent of 28*l.* payable quarterly.” Then followed a covenant by *Watts*, for himself, his heirs and assigns, to pay the rent to the plaintiffs, their heirs and assigns. Then a similar rent of 14*l.* was reserved to *Russ*. *Watts* afterwards “granted, bargained, sold, aliened, released, ratified, and confirmed, and did also *limit, direct, and appoint*,” the premises in question to *Wadham*, *Stevens*, and *Powell* (a trustee), habendum to *Wadham*, *Stevens*, and *Powell*, and the heirs and assigns of *Wad-*

ham and *Stevens*, as tenants in common, subject to the rent of 42*l.*, which *Wadham* and *Stevens* covenanted with *Watts* to pay in equal shares and proportions. *Wadham* died, leaving the defendant his devisee in fee and executor: the moiety which *Wadham* had covenanted to pay of the 28*l.* rent became after his death three years in arrear; and this action having been brought for the recovery of those arrears, a case was ultimately stated for the opinion of the Court of King's Bench, the question in which was "whether the defendant as executor or devisee of the testator *Wadham* were liable at law to an action of covenant on the said covenant made by *Watts*." The court held that he was not liable, for that the conveyance by *Watts* to *Wadham*, *Stevens*, and *Powell* operated as an appointment under the power created by the conveyance from *Russ* and the plaintiff to *Coates*, and therefore, even supposing the covenant made by *Watts* with the plaintiffs to be capable of running with the land and binding *Watts*' assignee, still it could not affect *Wadham*, who was not privy in estate to *Watts*, but came in paramount to him.

Brewster v. Kitchell is another case often referred to on this question: it is reported in Lord Raym. 318; Comb. 424, 466; 1 Salk. 198; 12 Mod. 166; Holt, 175, 669; with the arguments of counsel, 5 Mod. 368. It was a

feigned action on a wager, whether the defendant had a right to deduct 4*s.* in the pound out of a rent-charge granted to the plaintiff's ancestor out of certain lands in Bucks of which the defendant was *terretenant*, which tax of 4*s.* in the pound was granted in 4th & 5th W. & M. Upon a special verdict it appeared, that *R. Langford*, being seised in fee of the manor of *Baltimore*, granted to *Ellen Brewster* a rent-charge out of the manor, to her and her heirs, and there was a covenant for further assurance, and this memorandum was indorsed on the deed, viz.: "It is the true intent and meaning of these presents, that the within-named *Ellen Brewster*, and her heirs, shall be paid the said rent-charge without deducting of any taxes for the said rent," &c. Afterwards *R. Langford*, on the 8th of July, 1652, in pursuance of the covenant in the first deed, confirmed the rent to *Ellen Brewster* and her heirs, and covenanted that the rent should be paid at two certain feasts, free of all taxes. The report proceeds thus:—"After several arguments, Holt, C. J., pronounced the opinion of the court, and (by him) the question is upon this special verdict, whether the covenant indorsed upon the deed of the 20th of Nov., 1649, or the covenant in the deed of the 8th July, 1652 be sufficient to bind the grantor *and his heirs* to pay the rent, free of all taxes *hereafter to be charged on it*

by act of parliament? And all the judges were of opinion, that this covenant binds *the grantor and his heirs* to pay the rent, free of 4s. in the pound tax." Thus far, therefore, the question of the burden of the covenant running with the lands does not appear to have been taken into consideration. However, in a subsequent part of his judgment the report proceeds to state, Lord Holt "made another question, which was not observed at the bar, nor by any of the other judges, *viz.* : whether the *terretenant* was liable to an action on the covenant, *and he was of opinion he was not* ; for (by him) if the tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction, for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee, for it is a mere personal covenant, and cannot run with the land. And for a case in point, he cited Hardr. 87, pl. 5, *Coke v. Earl of Arundel*. Therefore, hence it does not appear that the defendant is bound by this covenant, for *non constat* whether he is *terretenant* or no, or what he is. For this reason he was of opinion that judgment ought to be given for the defendant. But the other three judges seemed to be in a surprise and not in truth to comprehend this objection, and therefore they persisted in their former opinion, *talking of agreements, intent of*

the party binding the lands, and I know not what. They gave judgment for the plaintiff, against the opinion of Holt, C. J., for the reasons aforesaid." The above account is extracted, *verbatim*, from Lord *Raymond*. The account of the disagreement between Lord Holt and the three judges, given in *Salkeld*, is extremely jejune, being comprised in a marginal note of about six words. But in 12th Mod. is a report of this same case of *Brewster v. Kitchell*, which, if accurate, and there seems to be no reason for distrusting it, places the matter in a far clearer and more satisfactory light. Lord Holt is there made to say, in delivering his judgment, "*If this rent was granted, so to be paid, it would be another matter, but here it is only a covenant and no words amounting to a grant, and therefore there can be no relief in this case against the terretenant but in equity; and therefore, for this point, I cannot see how the plaintiff can have his judgment, for if this covenant should charge the land it would be higher than a warrantia chartæ, which only affects the land from judgment therein given :*" "But the other judges" (says the reporter) "thought this covenant might charge the land, *being in the nature of a grant, or at least a declaration going along with the grant, showing in what manner the thing granted should be taken.*" So that the real difference between Lord Holt and the three judges

appears to have been, not whether an action of covenant could be maintained against the defendant as assignee of the land, but whether that which Lord Holt considered a covenant, was not in reality, part of the grant; for, if it were, the plaintiff was entitled to judgment beyond all dispute, the action not being one of covenant, but a feigned issue to ascertain the net amount of the rent-charge. So that, considering the case in this light, there is Lord Holt's opinion that a covenant to pay the rent-charge would not run with the land; an opinion from which none of the other judges dissented, the point on which they really differed being whether that which the Lord Chief Justice considered a mere covenant, was not, in point of fact, part and parcel of the grant; in which case Lord Holt himself had admitted, that "it would be another matter." With respect to the accuracy of the report in *Mod.*, it must be repeated, that there seems little reason for distrusting it. It is given at considerable length, and cannot be said to disagree with that of Lord Raymond, who admits that he had no distinct remembrance of the grounds on which the judges based their dissent from Holt's opinion.

In *Coke v. The Earl of Arundel* (the case cited by Lord Holt from *Hardress*, reported also in 1 Abr. Eq. 26), the Duke of Norfolk being seised of *Blackacre* and *Whiteacre*, subject to a certain

rent, granted *Blackacre* to A., covenanting that it should be discharged of the rent, and granted, afterwards, *Whiteacre* to B. A. filed a bill to charge *Whiteacre* with the whole rent, urging that the covenant ran therewith, and bound B. But the court thought the covenant only binding on the Duke of Norfolk and his representatives, and dismissed the bill. (See *Lord Cornbury v. Middleton*, Cases in Chancery, 208.)

The case of *Holmes v. Buckley*, 1 Abr. Eq. 27, is another case thought to bear upon this point, and was as follows. A., and R., his wife, being seised in right of R. of two pieces of ground, granted by indenture a watercourse to J. H. and his heirs, through the said two pieces of ground, and covenanted for them, their heirs and assigns to cleanse the same; and that all fines and recoveries to be levied or suffered of the grounds should enure to the strengthening and confirming the said watercourse. Afterwards a recovery was had, and a deed executed, *declaring the uses to be as aforesaid*. The watercourse, by mesne assignments, came to the plaintiff, and the two pieces of ground to the defendant, who built on the same, *and much heightened the ground which lay over the watercourse, and rendered it much more chargeable and inconvenient to repair; and, as it was alleged and in part proved, the building had much obstructed the water-*

course. And so the bill was for establishing the enjoyment of the watercourse, and that the defendant, and all claiming under him, might from time to time cleanse the same, according to the covenant. It was objected, that the covenant being a personal covenant, was not at all strengthened by the recovery; and that the plaintiff, and those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charges. But the court was of opinion, that this was a covenant which ran with the land, and was made good by the recovery; and though the plaintiff had cleansed the same at his own charge, while it was easy to be done, and of little charge; yet, since the right was plain upon the deed, *and the cleansing made chargeable by the building*, it was reasonable the defendant should do it, and decreed accordingly, and gave the plaintiff his costs.

It will be observed on this case, that not only may it be urged here, as in *Brewster v. Kitchell*, that the covenant was, in fact, part of the grant, but that, even if there had been no covenant, the defendant was guilty of a wrongful act, when he obstructed and injured the plaintiff's watercourse, subject to which he took his own estate, and of the existence of which he had notice, for the deed declaring the uses of the recovery, under which deed he must have claimed, made mention of the

previous grant of the watercourse; and the court appears to have relied upon the wrongful obstruction as a ground of its decree, as is plain from the words, "*and the cleansing made chargeable by the building.*" On the other hand, if the effect of the case be taken to be, that the court thought the covenant one on which an action might have been maintained at law by the plaintiff against the defendant, it seems questionable whether it do not prove too much; for, as both the parties were assignees, one of the land, and the other of the watercourse, it would, in order to support such an action of covenant, be necessary to hold, not merely that the burden of the covenant ran with the land, but that the benefit of it ran with the watercourse; for, otherwise, the plaintiff not being the original covenantee, would have no right of action: and it would probably be found somewhat difficult to contend that a covenant could run with such an easement as a watercourse. See *Milnes v. Branch*, 5 M. & S. 417, and *post. Vide tamen E. of Portmore v. Bunn*, 1 B. & C. 694.

The case of *Barclay v. Raine*, 1 S. & Stu. 449, has been thought to bear upon this controversy, but a close examination will show that it cannot, with propriety, be cited as an authority on either side. A. being seised of *Blackacre*, and *Whiteacre*, under the same title, and comprised in the same deeds,

sold *Blackacre* to *Thring*, and delivered the deeds to him, *Thring* covenanting for their production to A., his heirs, executors, administrators, and assigns. *This deed was lost, and though a copy of it existed, the copy was in a mutilated state, partly illegible.* A. afterwards sold *Whiteacre* to *Barclay*, the father of the plaintiffs: *Thring* then sold *Blackacre* to *James* and *John Slade*, who refused to give a fresh covenant for the production of title-deeds. On the sale to the *Slades*, part of the purchase-money was secured by mortgage; and the title-deeds, together with the mortgage-deed, were lodged with *Thring*. The plaintiffs, who had contracted to sell *Whiteacre* to the defendant *Raine*, applied to *Thring* for a covenant to produce the title-deeds, and he executed a covenant by which he covenanted with the defendant, *Raine*, to produce the title-deeds, *while he should continue mortgagee*. The defendant objected to this as insufficient, and *Thring* then executed another deed, in which he acknowledged the execution of the first covenant, and also that the deeds were, at the date of this last deed, in his possession. Under these circumstances, the question was, whether the defendant could be compelled to complete his purchase, and the Vice-Chancellor (Sir J. Leach) decided that he could not; and is reported in 1 Sim. & Stu. 454, to have said on

that occasion, "that equity never compels a purchaser to take without the title-deeds unless he have a covenant to produce them; that a mere equitable right to their production, even if it existed, would not be sufficient, and that *Thring's* covenant to produce did not run with the lands." It is obvious that this last observation, if made at all, could not have been intended to apply to the second covenant executed by *Thring*, which would be clearly insufficient, inasmuch as it was restrained to the time during which he should continue mortgagee; when he ceased to be mortgagee the *Slades* would be entitled to the deeds, and it was therefore necessary that some covenant should exist, the effect of which should last beyond that period; and so the master had reported. It was therefore immaterial, whether the second covenant would or would not run with the land, and the true question was; 1st, whether the covenant first executed by *Thring* would bind the *Slades*; 2ndly, if so, whether it would bind them for the benefit of *Raine*; and, 3rdly, supposing the covenant would bind the *Slades*, and would enure to *Raine's* benefit, *whether there was sufficient legal evidence of its contents*; for, if not, it would of course be as useless as if it never had existed. (See the judgment of the Master of the Rolls in *Bryant v. Busk*, 4 Russ. 1.) Now the first of these

points would have involved the question whether the *burden* of *Thring's* covenant would run with *Blackacre* to his vendees, the *Slades*? The second would have involved the question, whether the *benefit* of it would run along with *Whiteacre*, from A., the covenantee, to the *Barclays*, and from them to *Raine*? But it became unnecessary to decide either of these two points, because it appears clear that the *third* point was against the vendor; in other words, it appears clear that whatever might have been the effect of the covenant, there was no legal evidence of its contents. The deed was lost, the copy was mutilated and partly illegible; and, if entire, would only have been secondary evidence of the original if duly proved to be a true copy, and it does not appear that that could have been done; and the deed lastly executed by *Thring*, even had it set out the contents of the first deed, which in all probability it did not, would not have been evidence against the *Slades*, as it was not executed till after *Thring* had parted with his interest in the lands to them. The questions, therefore, whether either the benefit or burden of *Thring's* covenant ran with the land, did not arise; and it might have been supposed that the Vice-Chancellor, in pronouncing judgment, would have omitted all consideration of them, had it not been that the reporter puts into his mouth the

following words: "*Thring's* covenant to produce does not run with the land." However, in the 7th volume of *Jarman's Bythewood*, p. 375, under the report of *Barclay v. Raine*, I find the following note:—"His Honor lately denied his having used the expression here imputed to him; he did not say that *Thring's* first covenant did not run with the land (*for his Honor thought it clearly did*), but that the *second* covenant was restricted to the period of his being mortgagee." Rolls, 28th July, 1830. It seems, therefore, that Sir John Leach's private opinion was, that *Thring's* first covenant *did* run with the land; but whether he thought that the *benefit* of it ran with *Whiteacre*, or the *burden* with *Blackacre*, or that both *benefit* and *burden* ran with the land, is left completely *in ambiguo*. One thing, however, is quite plain, *viz.*, that *Barclay v. Raine* is no decision on the present question; since, had his Honor thought that there was a sufficient covenant, and sufficient evidence of its contents, he must have decided in favour of the plaintiffs, and against *Raine*, who would then have had no excuse for not completing his purchase.

Covenants like that to pay a rent-charge issuing out of the land, have reference to an interest possessed by the covenantee independently of the covenant, but there are other covenants uncon-

connected with any interest in the land, such as a covenant by the owner of the land, that it shall never be built upon, or never planted, or imposing any other restriction on the mode of its enjoyment, in favour of a person having no property therein. The possibility of making these covenants run with land has been questioned, not merely on the general ground above stated, namely, that the burden of a covenant cannot run with land except between landlord and tenant, though the benefit thereof may; but also on the ground that they infringe the rule of law against perpetuities, by tending to impede the free circulation of property. An instance of a covenant of this sort is to be found in a note to *Fitzherbert's Natura Brevium*, fo. 145, for which he cites the Year-Book 4 H. 3, 57, not in print. The note is as follows:—"A man covenants that neither he nor his heirs shall erect any mill in such a place, and an action of covenant is thereupon brought by the heir, and well." I presume that the words *by the heir* signify the heir of the covenantee, and probably the main question in that case was whether the heir, who had perhaps inherited some mill which the covenant was framed to protect, or the executor of the covenantee, should bring the action. It has been remarked by very high authority, that, "in the case cited by Hale

[the supposed commentator on Fitz. N. B.], the covenant was held to be good; but that does not go far towards removing the doubt, for that case occurred at a period long before the law of perpetuity was introduced," 3rd Report of the R. P. Commissioners, 54. In addition to which it may be observed, that even had the case occurred since the rule against perpetuities, it might not have effectually resolved the doubt as to the operation of that rule, for the action was brought against the covenantor himself, of whose liability there could be no question; and as the word *assigns* does not occur in the covenant, it may be doubted whether the assignees would have been bound by it, as it can hardly be said to relate to a thing *in esse*, parcel of the covenantor's land; and if the assignees would not be bound by it, it could have no tendency to impede the circulation of the land, or to create a perpetuity.

These subjects were discussed in the case of *Keppel v. Bailey*, in the Court of Chancery, 2 Mylne & K. 517, in which the questions were elaborately argued, and every authority on either side, it is believed, cited, either by counsel, or by the Lord Chancellor (Brougham) in delivering his judgment. In that case, certain persons having formed themselves into a company for the establishment of a railroad, called the *Trevil*, Edward and Jonathan Keppel, who held the

Beaufort iron-works under a long lease, had covenanted with the proprietors of the railroad and their assigns, that they, their executors, administrators and assigns, would procure all the limestone wanted for the iron-works from the Trevil quarry, and carry it along the Trevil railroad, paying a certain toll. Edward and Jonathan Keppel assigned their lease of the iron-works to the defendants, who began to construct a railroad to other lime-quarries situated eastward of the Trevil quarry; and on a bill for an injunction to restrain them from using that or any other new road, it was, among other points, objected to the covenant that it was void, as tending to create a perpetuity, that it was void as in restraint of trade, and that it was not such a covenant as would run with the lands, so as to bind the defendants, as assignees of the iron-works. Upon the first point, the Lord Chancellor appeared to think that it could not be invalidated on the ground of perpetuity. "I do not," said he, "at all doubt that the enjoyment of property may be tied up, and an illegal perpetuity created, by annexing conditions to grants, or by executing covenants, whereby whoever happens to be in possession shall be restrained from using that which is the subject of the grant or covenant, in all but a certain prescribed way, provided always that the restraint so constituted is not reserved in favour of some other party who may release it at his pleasure; and, therefore, all such conditions and covenants are void if they go beyond the period allowed by law. But if the party for whom the condition is made, or the party covenantee, has the entire power of dealing with his interest in the subject-matter; it is an obvious mistake to treat this as an instance of perpetuity, or of any tendency towards perpetuity. Indeed, the property, the subject-matter of consideration here, is not the estate fettered by the condition or covenant, but the benefit reserved by the condition or secured by the covenant, and upon that there is, by the hypothesis, no restraint at all; and certainly, to take another view, though one of the parties interested, the owner of the property subject to the covenant or condition, may be fast, the other is loose, and so, *quoad* all, taken together, that is, *quoad* all interested, the property is free.—Upon other grounds such a restraint may be objectionable and void in law, as well as bad in policy, but certainly not upon the doctrine of perpetuity, by which it is no more struck at, than a right of a way or other easement, which the owners of one estate may enjoy over the close of another. There appears, at first, to be more weight in the objection, that covenants of this description are in restraint of trade. The covenant here is not in *general* restraint of trade, which would,

beyond all doubt, make it void, in whatever way the purpose was effected. The restraint is only partial, and then the law will support it; 'if,' to use the words of Parker, C. J., in *Mitchell v. Reynolds*, 'in the opinion of the court, whose office it is to determine upon the circumstances, it appears to be a just and honest contract.'"

Upon the great question, *viz.*, whether the covenant were capable of running with the Beaufort iron-works, so as to bind the defendants as assignees thereof, his lordship expressed a very decided opinion in the negative:—"Assuming that the Keppels covenanted for their assigns of the Beaufort works, could they by a covenant with persons who had no relation whatever to those works, except that of having a lime-quarry and a railway in the neighbourhood, bind all persons who should become owners of those works, either by purchase or descent, at all times, to buy their lime at the quarry, and carry their iron on the railway; or could they do no more, if the covenant should not be kept, than give the covenantees a right of action against themselves, and recourse against their heirs and executors, as far as those received assets? Consider the question first upon principle. There are certain known incidents to property and its enjoyment, among others, certain burthens wherewith it may be affected, or rights which

may be created, or enjoyed with it, by parties other than the owner, all which incidents are recognised by the law. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no detriment, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every *messuage*, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public, as well as of a simple, nature, and no one who sees the premises can be ignorant of what all the vicinage knows." (See *Ackroyd v. Smith*, 10 C. B. 164.) "But if one man may bind his messuage and land

to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations on the premises, besides many other restraints, as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised. The difference is obviously very great between such a case as this and the case of covenants in a lease whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, though the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioner all the while the term continues; it is only something taken out of the demise, some exception to the temporary surrender of the enjoyment. It is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end."

The question was also discussed at considerable length in *The Duke of Bedford v. The Trustees of the*

British Museum, 2 Mylne & K. 552. That case, however, turned at last upon a point purely of equity, the court conceiving, that, however the rights of the parties might be at law, it was a case in which equity ought not to interfere. See *Collins v. Plumb*, 16 Ves. 434.

In *Randall v. Rigby*, 4 M. & W. 130, the defendant had covenanted for the payment of an annuity or rent issuing out of land. "No doubt," said Parke, B., "this covenant is collateral or in gross in one sense, *that it does not run with the land*, or rent."

In *Bristow v. Wood*, 1 Collyer, 480 (more fully reported 14 L. J. 50), a purchaser was discharged from his contract upon a doubt whether the land was not bound by a covenant by the vendor not to build houses in courts, or of a less value than 300*l.*, not to erect a steam-engine or manufactory, or to carry on any trade that might be a nuisance to the neighbourhood, although the purchaser at the time of the contract had no notice of the covenant. In *Whatman v. Gibson*, 9 Sim. 196, and *Mann v. Stephens*, 15 Sim. 379, the Vice-Chancellor restrained, by injunction, assignees who had purchased with notice of similar covenants. It seems clear, however, that the fact of notice or no notice cannot in a court of law affect the question whether the covenant runs with the land; and if any sound distinction exists in this

respect between the case of a purchaser with and without notice, it can be worked out only in a court of equity. Such appears to have been the opinion of the Vice-Chancellor in *Whatman v. Gibson*. See *Schreiber v. Creed*, 10 Sim. 9; and *Tulk v. Moxhay*, 2 Phil. 774; where it was laid down by Lord Cottenham, that a covenant made by the purchaser of land that he and his assigns would use, or abstain from using, the land in a particular way, may be enforced in equity against all purchasers, with notice of the covenant, without reference to the question whether such covenant run with the land or not; and Lord Cottenham there explained the judgment of Lord Brougham in *Keppel v. Bailey*, and stated that this equity is wholly independent of the common law question as to the covenant running with the land. [See further *Cole v. Sims*, 23 L. J. Chan. 258; *Jay v. Richardson*, 31 L. J. Chan. 398; *Parker v. Whyte*, 32 L. J. Chan. 520; *Western v. McDermot*, 35 L. J. Chan. 190.]

In *Moore v. Greg*, 2 Phil. 717; the same Chancellor decided that an equitable assignee of a lease is not liable to be called upon in equity to fulfil the covenants in like manner as he would have been bound to do if the assignment had been complete at law. [See *Cox v. Bishop*, 26 L. J. Chan. 389.] It is apprehended, however, that an equitable assignee of a

lease would, like any other purchaser with notice, be restrained by a court of equity from infringing a covenant like that in *Tulk v. Moxhay*. The distinction is obvious between the enforcement of "an equity attached to the property" (to use the words of Lord Cottenham), the breach of which cannot be adequately compensated by damages in an action against the person legally liable on the covenant, and the enforcement in equity, of the performance of covenants to pay rent and the like, the non-performance of which is capable of being fully compensated in damages, while the person in whom the lease is legally vested is liable upon those covenants.

Upon the whole, there appears to be no authority for saying that the *burden* of a covenant will run with land in any case, except that of landlord and tenant; while the opinion of Lord Holt in *Brewster v. Kitchell*, that of Lord Brougham in *Keppel v. Bailey*, and the reason and convenience of the thing, all militate the other way. [See further *Bailey v. Stephens*, 12 C. B., N. S. 91; S. C. 31 L. J. C. P. 226, where a plea of immemorial right of the owner of Bloody Field and those whose estate he had and their tenants, as appurtenant, to cut down trees on the plaintiff's land, and also another plea laying the like right in the occupiers of Bloody Field were held bad, on the ground that such right could

only be granted in gross, and only be assigned by ordinary conveyance, because not beneficial to the land in respect of the ownership of it, and not an incident of a known and usual kind, and not connected with the enjoyment of land; and see *Ellis v. The Mayor, &c., of Bridgnorth*, 15 C. B. N. S. 78; S. C., 32 L. J. C. P. 273; where the enjoyment of a stall for the sale of goods on market days in front of plaintiff's house, was held to be sufficiently connected with the use of the house to confer a right. See also *Hill v. Tupper*, 2 Hurlst. & Colt. 121; S. C., 32 L. J. Exch. 216; and *Richards v. Harper*, 35 L. J. Exch. 130, where the majority of the court seem to have thought that the burthen of a covenant with the owner of adjacent land, to let him mine there without paying for injury to the covenantor's land, would not run with the land. It should be observed that in some cases the terms of a covenant may operate as a grant of an incorporeal hereditament, so as to render it unnecessary to determine whether *quid* covenant the burthen of it runs with the land: *Rowbotham v. Wilson*, 8 H. of L. Ca. 348; S. C., 30 L. J. Q. B. 49; *Gale on Easements*, 3rd edit., p. 73.]

As to the subject-matter to which a covenant may be incident, so as to run with it to the assignee:—The principal case shows that covenants will not run with personal property; [and see *Garton v.*

Gregory, 3 B. & S. 90; 31 L. J. Q. B. 302, where the covenant related to improvements in the land, but also to new articles to be introduced on to it for the purpose of trade.] In *Milnes v. Branch*, 5 M. & S. 417, J. B., being seised in fee, conveyed to the defendant and J. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have a rent out of the premises, and subject thereto to the use of the defendant in fee, and the defendant covenanted with J. B. his heirs *and assigns*, to pay J. B., his *heirs and assigns*, the rent, and to build within a year one or more messuages on the premises for securing the rent. J. B. within a year demised the rent to the plaintiffs for 1000 years. It was held that covenant would not lie for the plaintiffs, either for non-payment of the rent or not building the messuages; and the court, in giving judgment, expressed a clear opinion that a covenant could not run with rent. Accord. per Parke, B., in *Randall v. Rigby*, 4 M. & W. 135, where the defendant had covenanted to pay a rent charged upon land. "No doubt," said his lordship, "this covenant is collateral or in gross in one sense, that it does not run with the land or rent, for that *Milnes v. Branch* is an authority." [See *Butler v. Archer*, 12 Ir. Ch. R. 104.] In *Bally v. Wells*, Wilmot's Notes, 341, *vide* 3 Wils. 25, it was, however, held that a covenant might run with tithes.

That was an action brought by *George Bally*, clerk, rector of *Monkton*, against *James Wells*, assignee of one *Whitmarsh*, to whom the plaintiff had demised all the tithes of the parish of *Monkton*, for six years, by a lease containing the following covenant:—"And the said *James Whitmarsh*, for himself, his executors, administrators, and assigns, doth covenant and agree, not to let any of the farmers now occupying the estate at *Monkton* have any part of the tithes aforesaid, without the consent of the said *George Bally* in writing first had and obtained." *James Whitmarsh* assigned his interest in the tithes to the defendant, who let several farmers, occupiers, have part of the tithe without the consent of Mr. *Bally*, who thereupon brought an action of covenant, and after verdict for the plaintiff, it was moved, among other things, in arrest of judgment, that tithes are incorporeal, lying in grant, and therefore that such a covenant cannot run with them. The court, however, gave judgment for the plaintiff. And in *The Earl of Egremont v. Keene*, 2 Jones (Exchequer, Ireland), 307, a covenant to pay rent reserved on a demise of the tolls of a market, was held to run with the tenement, and bind the assignee of the lessee. But see Co. Litt. 44 b, 47 a. In *Muskett v. Hill*, 5 Bing. N. C. 694, the question whether a covenant could run with an assignable right to search for

and take minerals, was discussed, but not decided. See *E. of Portmore v. Bunn*, 1 B. & C. 694. [The same point afterwards arose in *Martyn v. Williams*, 1 H. & N. 817, in respect of a right to dig, work, and search for china clay during a term; and it was held by the Court of Exchequer that a covenant to leave the works in repair at the end of the term ran with the reversion in the land, and might be sued on by the assignee of the fee therein. In this case the court observed that the statute of Henry 8 extends in express terms to incorporeal hereditaments and tenements, and is not confined merely to lands. Accord. *Norval v. Pascoe*, 34 L. J. Chan. 83, where a similar covenant was held to run with the land.

It was once supposed that covenants would not,] run with an estate to which the covenantee is only entitled by estoppel. *Noke v. Auder*, Cro. Eliz. 436; *Lyn v. Wyn*, O. Bridgman, 131; *Whitton v. Peacock*, 2 Bing. N. C. 411. [But the contrary was maintained in this work for the reasons hereafter assigned, which were adopted and acted upon in *Cuthbertson v. Irving*, 4 H. & N. 742, *post*, p. 80.]

The above proposition in terms excludes the case of a covenant in a conveyance effectual at first by estoppel only, but which has subsequently become a valid conveyance in point of interest, in consequence of the acquisition of an

estate by the conveying party. In such a case, it is clear that the assignee of the covenantee, not being entitled "*only* by estoppel," may sue equally as if the conveyance had from the first transferred an estate in interest. For example, if one having no estate make an ordinary lease by indenture, and subsequently acquire the fee, the lease becomes an estate in interest; and the lessor and his assigns on the one hand, *Webb v. Austin*, 8 Scott, N. R. 419, and the lessee and his assigns on the other, *Sturgeon v. Wingfield*, 15 M. & W. 224, may maintain all such actions on the covenants, as if the lessor had had the fee simple at the time of making the lease.

Perhaps, also, the proposition might be correctly limited to cases where it must *appear* upon the pleadings of the assignee himself, that there is no estate with which the covenant can run.

The following is an attempt to state the results of the authorities upon this subject, and to distinguish what is established law from what still remains in doubt:—

1. As we have already seen, where an estate by estoppel becomes an estate in interest, by the lessor's subsequent acquisition of an estate, the parties and their assignees are in the same position as if the estate had been *ab initio* an estate in interest. *Webb v. Austin*, 8 Scott, N. R. 419; *Sturgeon v. Wingfield*, 15 M. &

W. 224. So far as *Whitton v. Peacock*, 2 Bing N. C. 411, is an authority to the contrary, it cannot be considered as law. See 2 Wms. Saund. 418 n. (e). *Church v. Dalton*, 2 I. C. L. R. 249.

2. Where it appears upon the face of the deed containing the covenant, that the lessor has not the legal estate in the property, an assignment does not transfer the benefit or burthen of the covenant. Thus, where a lease was made by indenture, reciting that the lessor had only an equitable title, it was held that the lessor, and not his assignee, could sue upon the covenants. *Pargeter v. Harris*, 7 Q. B. 708. That is only an instance of the rule that an instrument makes no estoppel where the truth appears by the same instrument. [The estoppel created by the lease is not avoided by a disclosure of the lessor's want of title in the assignment. *Cuthbertson v. Irving*, 4 H. & N. 742, and *post*, p. 80.]

3. Where it appears by the statement in pleading of the assignee himself who seeks to enforce the covenant, that the covenantee had no estate; even though it also appears that there was an estoppel which *might have been* relied upon, the assignee [would, according to the view taken in *Noke v. Awdler*,] fail on his own showing. In such a case, the party entitled to the benefit of the estoppel contradicts instead of relying upon it. (See *Ludford v.*

Barber, 1 T. R. 95, per Buller, J.)

4. Where the assignee states as part of his title some particular estate to have been in the lessor at the time of the lease, and it does not appear that the lessee is estopped by the lease from denying *that particular estate* as against the lessor, he may deny it in the action at suit of the assignee. *Carvick v. Blagrove*, 1 B. & B. 531; 4 Moore, 303, S. C. [*Weld v. Baxter*, 11 Exch. 816, S. C., affirmed in error, 1 H. & N. 568. The better mode of pleading seems to be to state generally that the lessor had an estate sufficient to enable him to make the demise, leaving a reversion in the lessor and his heirs, or the lessor and his personal representatives, as the case may be.]

5. In an action by lessor against assignee of lessee, it is unnecessary for the lessor to allege his title; and, if it neither appears by the lease, as in *Earl of Portmore v. Bunn*, 1 B. & C. 694, nor by the lessor's pleadings, that he had no title, it is not competent for the assignee to raise the question whether he had an estate in interest, or only by estoppel. *Taylor v. Needham*, 2 Taunt. 278; *Cooper v. Blandy*, 1 Bing. N. C. 45; *Warburton v. Ivie*, 1 Jones (Exchequer, Ireland), 313.

6. If a lease be made by indenture, in such a form as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lessor

conveys all his interest, the [heretofore] disputed question arises, whether the assignee can sue the lessee or his assignee for breaches of covenant in respect of which the lessor might have sued, had there been no assignment. [This question has at length been decided in the affirmative by the unanimous judgments of the Courts of Exchequer and Exchequer Chamber in the case of *Cuthbertson v. Irving*, 4 H. & N. 742; S. C. in error, 6 H. & N. 135; S. C. 29 Law J. Exch. 485. In that case the action was by the assignee of the lessor against the lessee upon a covenant to repair, made with the lessor and his heirs. The defendant, by one of his pleas, denied the assignment to the plaintiff, and alleged that the lessor had at the time of the demise no reversion, and that no reversion had vested in the plaintiff. Issue was joined upon this plea, and at the trial a special case was stated, by which it appeared that the lessor was without a legal title at the time of making the lease, that the lease did not, in terms, show the contrary, and that the assignment to the plaintiff disclosed the want of title, but contained apt words to convey a reversion in fee. Upon these facts the Court of Exchequer directed that the judgment should be entered for the plaintiff, and stated that in their opinion "so long as the lessee continues in possession under the

lease, the law will not permit him to set up any defence founded on the fact that the lessor *nil habuit in tenementis*; and, upon the execution of the lease, there is created, in contemplation of law, a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee." This judgment was, as has been mentioned, affirmed in the Exchequer Chamber, where reference was made to the following discussion upon the authorities bearing upon this point. Upon this question, before it had been thus directly decided,] Parke, B., in *Gouldsworth v. Knights*, 11 M. & W. 337, had expressed an opinion in the affirmative; and there seems to be no sound reason why the assignee of a reversion should not establish his title by way of estoppel. An estoppel does not necessarily involve a falsehood. On the contrary, facts are ascertained through the medium of estoppel without reference to the question whether really true or false; and it would be sheer fallacy to assume, that a fact established by estoppel, has therefore no real existence. For judicial purposes it ought to be dealt with as if it really existed. It is clear that the assignee of a lessor is entitled to some extent to the benefit of estoppel, and it seems difficult to contend, that the law of estoppel, subject of course to all the limitations and exceptions which form part of that

branch of the law itself, (see an instance of exception in the case of an interest passing, *Doe d. Strode v. Seaton*, 2 C. M. & R. 728; and in the case of eviction by title paramount, *Doe d. Higginbotham v. Barton*, 11 A. & E. 307), shall not apply in favour of the assignee, equally in an action of covenant as in an action of ejectment, or of use and occupation. *Rennie v. Robinson*, 7 Moore, 539; *Gouldsworth v. Knights*, 11 M. & W. 337. The lessee has (in a case of considerable authority) been held estopped from pleading *nil habuit in tenementis* in an action of covenant at suit of the assignee of the lessor, *Palmer v. Ekins*, 2 Lord Raym. 1550, and it seems that he ought not in such a case to be allowed to plead any plea which would be satisfied by proof simply that the lessor had *no* title when he made the lease. The cases which have been supposed chiefly to countenance a contrary opinion are *Noke v. Awder*, *Whitton v. Peacock*, *Curvick v. Blagrave*. An examination of those cases will show that they have no such effect.

Noke v. Awder, Cro. Eliz. 436, was not an action between landlord and tenant, nor did it in any way turn upon the statute of 32 H. 8, c. 34; but it may for the purpose of the present inquiry, be conceded, that no sound distinction can be drawn in respect of the operation of estoppel, between cases at common law and

under the statute. It was an action by the assignee (*Noke*) of the assignee (*J. S.*) of the assignee (*Abel*) of a lease for years from one John King to the defendant (*Awder*); and the declaration stated the making of the lease by John King to Awder, an assignment from Awder to Abel by deed containing a covenant by Awder with Abel for quiet enjoyment; that Abel assigned to *J. S.*, and *J. S.* to the plaintiff; and it is stated as breach, that, before John King, the lessor, had anything in the premises, one Robert King was seised in fee, and died so seised, and that his heir Thomas King, entered upon the plaintiff, and ousted him. The plaintiff (to follow the argument of Coke, *Attorney-General*, for the defendant), was in this dilemma, that, either the lessor John King had upon the plaintiff's showing no estate, and then no term was created by the lease, and so no estate passed by the assignment from the defendant to Abel, consequently there was no actual privity of estate between the defendant and the plaintiff, nor any estoppel, because the facts were stated on the record, and *the estoppel not relied upon*; or, supposing that the declaration were read as alleging a valid lease from John King to the defendant; then consistently with the declaration, Thomas King, who was alleged to have ousted the plaintiff, had no title, was a mere trespasser, and

so there was no breach of the *general* covenant for quiet enjoyment. So that, *quidcunque videtur*, the action could not be maintained. And the court are reported to have held, "that it was clear upon the matter shown that the action lay not, for the plaintiff ought to have shown an estate by descent in John King at the time of the lease and the assignment made, or an estate whereby he might make a lease, and that this was afterwards determined; and so confess the estate in the lessor, otherwise this action of covenant lieth not, *and it never lies upon the assignment of an estate by estoppel*. Wherefore they were of opinion to have then given judgment against the plaintiff, but afterwards they would advise until the next term." If the judgment of the court had finally proceeded upon this reasoning, it would only have been a decision that as the plaintiff *upon his own showing* never had conveyed to him any estate in the premises, he could not sue upon the covenant as one running with the land. The estoppel was not pleaded, but the contrary; and the placitum in Comyn's Digest, *Covenant* (B. 3), "So the assignee of a lease which *appears* to be good *only* by estoppel shall not have covenant," R. Cro. El. 437, Mo. 419, correctly limits the obiter opinion of the court (which did not form the basis of their final decision) to cases where it *appears* that no

estate passed to the covenantee. The ultimate decision in *Noke v. Awder* was founded upon the insufficiency of the breach, assuming the lease to have been valid in *interest* and not merely by estoppel, for the report proceeds, "Note; This was continued until Trin. 41 Eliz., and then being moved again, all the justices resolved that the assignee of a lease by estoppel shall not take advantage of any covenant; *but that it shall not be intended a lease by estoppel, but a lawful lease.* But no sufficient title being shown to avoid it, it is then as an entry by a stranger without title, which is not any breach. *Wherefore* it was adjudged for the defendant."

Noke v. Awder cannot therefore be considered as establishing the general proposition, that the benefit of covenants in a lease which operates by estoppel does not run with the reversion; or that it is competent for the lessee or his assignee, to raise the point against the assignee of the lessor.

Whitton v. Peacock, 2 Bing. N. C. 411, was a case out of Chancery. The land was copyhold. Littlehales, and Maria, his wife, having no estate therein, demised to Keys for years, the rent being reserved payable to Littlehales, and the covenant being made with him only. Afterwards the lessee assigned his interest; the lessors, by surrender of the true owner and

admittance thereon, acquired the legal estate; and, subsequently, by surrender and admittance, their estate so acquired became vested in the plaintiff. The question was, whether he could maintain an action of covenant against the assignee of the lessee. The case was argued as if the covenants in the lease were such as to run with the land (which *quere*, see *Wootton v. Steffanoni*, 12 M. & W. 129), and as if the plaintiff was assignee of the reversion by estoppel, by a conveyance which passed all the Littlehales' interest, whether by estoppel or otherwise. The practice of stating reasons for the answers to a case sent out of Chancery, had, at that time, fallen into disuse (see Lord Campbell's "Lives of the Chancellors," vol. 7, p. 137), though it has since, happily for the profession, and beneficially for the public, been resumed;* and the Court of Common Pleas, without stating any reasons, answered, that the plaintiff could not maintain an action against the assignees of Keys for breach of the covenants in the lease. The case, however, does not decide that the assignee of a reversion created by estoppel, as between lessor and lessee, could not sue on the covenants in the lease. That question did not arise upon the facts, because, as pointed out by Parke, B., in *Gouldsworth v. Knights*, 11 M. & W. 344, the

* Written before 15 & 16 Vict. c. 86, s. 61.

"reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance." It is difficult, perhaps impossible, to discover the precise ground of the decision in *Whitton v. Peacock*, but it may be conjectured that the point actually intended to be decided was, that the purchaser by surrender and admittance of a copyhold estate, from a vendor who had, previously to his acquiring any interest, made a lease of the land, but who had subsequently acquired therein a copyhold estate of inheritance, could not be considered as an assignee of the reversion within the statute of H. 8; a position apparently untenable. *Webb v. Austin*, *supra*, and the learned note to *Partington v. Woodcock*, 5 N. & M. 675. Parke, B., in stating (*Gouldsworth v. Knights*, 11 M. & W. 337) that *Whitton v. Peacock* was correctly decided, only referred to the decision as affecting the case of a *pure* estoppel, and evidently did not intend to uphold it upon the point not at all under consideration in *Gouldsworth v. Knights*, and which was so fully discussed, and decided for such convincing reasons, in *Webb v. Austin*.

Carvick v. Blagrove, 1 B. & B. 531; 4 Moore, 303, S. C., was an action of covenant by assignee of lessor against lessee, for rent in arrear. The count alleged that Seth Thomas was possessed of the demised premises, "that is

to say, for the remainder of a term of twenty-two years, commencing from, &c., and that, being so possessed, he, on, &c., by indenture, demised the premises to the defendant, to hold from, &c., for a term of nine years;" that afterwards, Thomas, "being possessed of the said premises for the remainder of the said term of twenty-two years, subject to the said lease for nine years," by another indenture, "granted, bargained, sold, and assigned the said premises, and all his estate, and interest therein, to the plaintiff, for the residue and remainder of the said term of twenty-two years." The defendant pleaded that the lessor (Thomas) was not, at the time of making the indenture of lease, possessed of the demised premises for the residue and remainder of the supposed term of twenty-two years *modo et formâ*. To that plea there was a *general* demurrer, and upon argument, the plea was holden good in substance by the Court of Common Pleas. The objections taken were, first, that the plea amounted to *nil habuit in tenementis*; secondly, that it raised an immaterial issue, by traversing the precise extent of the term of twenty-two years. The second point was disposed of by the opinion of the court, that the plea put in issue only the substance of the allegation, *viz.*, that Thomas, being possessed of a term, made a derivative demise to the defendant. That the substantial question, therefore, at the trial of such an

issue would be, whether Thomas had a larger term out of which he could carve the lesser term? As to the first and more serious objection, the court admit the general doctrine of estoppel between lessor and lessee, and also that the estoppel had "equal effect between the lessee and one who is privy, or, in other words, derives his legal title from the lessor." But they add, that "the lessee is under no engagement, nor liable to any one but *the legal assignee.*" "The allegation of the possession by Thomas for a term of twenty-two years, is made by the assignee, and not by Thomas himself; and the lessee has a right to know whether there is a privity between him and the assignee by means of a conveyance by the lessor of the true title. From the nature of the case, he cannot be prevented from putting in issue any material fact alleged by the assignee." And again, "*if the effect of the plea is to dispute the interest which a lessee took under a lease from a lessor, the plea is bad whatever shape it assumes. The present plea leaves the lease in the same state as the plaintiff has described it, and the defendant merely objects, that the title he has alleged as being assigned to him, was not the true title.*" The court, therefore, only professed to decide that the tenant was not estopped to deny the existence of *the particular reversion alleged to have been assigned to the plaintiff.* They

did not decide that if the lessee had been *estopped* as against the lessor to deny that particular reversion he would not also have been estopped as against the assignee. No such question arose upon the pleadings, for the lease was not set forth, and enough did not appear upon the record to raise the question. (See per Paterson, J., *Parryer v. Harris*, 7 Q. B. 708). Had the plaintiff, instead of demurring, replied by way of estoppel, showing the lease, and that thereby (if such was the fact) the tenant admitted a chattel reversion in the lessor, or if enough of the lease had appeared upon the record to show that fact, the same court might, consistently with their opinion expressed upon the actual state of the pleadings, have given judgment for the plaintiff. *Carvick v. Blagrove*, therefore, does not decide the point under consideration. Moreover, doubts have been expressed of its soundness. See 2 Wms. Saunders, 207 d, 418 c, n. (d).

In the case of a lease for years, made by a tenant for life, or in tail, who dies before the end of the term, an assignee, who has become so during the life of the landlord, may sue upon the covenants; but not one who has become so after the lease has become actually void by the death of the landlord. *Andrews v. Pearce*, 1 N. R. 158; *Williams v. Burrell*, 1 C. B. 402. These cases are referred to only to prevent mis-

apprehension. They do not affect the present question, because in them an interest passed by the lease, and there was no estate, either in interest or by estoppel, at the time of assignment.

But supposing it to be correctly concluded, that no case of authority negatives the proposition, that the assignee of a reversion established by the medium of an estoppel, aptly pleading, may sue upon the covenants in the lease, it must be conceded that the question, to what extent the parties are estopped by the execution of a lease, is one of much nicety, and only to be answered in each case by reference to the terms of the instrument. [If the covenants are with the lessor and his heirs, and he has no title, he may allege in the declaration a title in fee-simple, and then if the defendant traverses this allegation, the plaintiff, by producing and proving the lease, will be entitled to succeed on the issue, for the lease will raise a presumption of a seisin in fee, which presumption the defendant will be estopped from rebutting. *Cuthbertson v. Irving*, 4 H. & N. 742.]

Akin to this part of the subject is the question revived by the decision of the Court of Queen's Bench in *Pollock v. Stacey*, 9 Q. B. 1033, that the relation of landlord and tenant, properly so called, can be created between assignor and assignee upon a conveyance of the entire residue of a term, there

being no reversion either in fact or by estoppel; a decision contrary to the opinion expressed by the Court of Exchequer in *Barrett v. Rolph*, 14 M. & W. 348. See also *Wollaston v. Hakewill*, 3 Sc. N. R. 593; 3 M. & G. 297, S. C.

The same question had previously caused a difference of opinion on the Irish bench, the Court of Queen's Bench in that part of the kingdom having held that *Pluck v. Digges*, 5 Bligh, N. S. 41, had authoritatively settled the question in the negative, *Lessee of Fawcett v. Hall*, Alc. & N. 248; the Court of Exchequer having been of a contrary opinion. *Lessee of Walsh v. Feely*, 1 Jones, 413. The latter court, however, "after reviewing all the cases upon the subject, have since concurred with the Queen's Bench," 2 Furlong on Landlord and Tenant, 1121, referring to *Lessee of Porter v. French* [9 Irish Law Rep. 514]; so that both those courts are now of accord with the Court of Exchequer in England.

Without professing to discuss the question here, it may be observed that it was not fully argued in either *Barrett v. Rolph*, or *Pollock v. Stacey*, and that it cannot be considered as settled by the refusal of the rule in the latter case. It will require for that purpose to begin the inquiry earlier than the *Nisi Prius* ruling in *Poultney v. Holmes*, 1 Strange, 405, acted upon by the Court of Queen's Bench. The distinction

between conveyances by way of subinfeudation and by way of assignment, of estates in fee (see Wright's Tenures, 156) does not appear to have existed in the case of lesser estates, or to have been acted upon after the statute of *quia emptores* for any purpose relating to lands of socage tenure, until it was brought back to light in *Poultney v. Holmes*, to meet the supposed hardship of a particular case. The authorities collected in the note to *The King v. Wilson*, 5 Man. & R. 157, as tending to establish the contrary, seem, even in the opinion of the very learned annotator (see page 162), to fail of that object. Assuming for the sake of argument, the position in *Poultney v. Holmes* to be correct in what relation do the supposed under-tenant of all the lessee's interest and the superior landlord stand? May the landlord treat the supposed under-tenant as his tenant, by reason of his having acquired the entire residue of the term? It will hardly be contended that he cannot. See *Palmer v. Edwards*, 1 Doug. 187, n. If he can, then the supposed under-tenant may hold one and the same land immediately of two several lords, which cannot be, according to Littleton, § 231, and Lord Coke's Commentary, Co. Litt. 152 b. Perhaps the

true distinction may be, between cases where it appears judicially that the entire interest has been conveyed, and cases where, by reason of estoppel, it does not so appear. In *Baker v. Gostling*, 1 Bing. N. C. 19, relied on in *Pollock v. Stacey* as confirming *Poultney v. Holmes*, there appears to have been a reversion by estoppel, and where there is such an estoppel, it is not necessary, as between the parties estopped, to advert to the question, whether in fact the instrument operates as an assignment or not. In *Cremens v. Hawkes*, 2 Jones & Latouche, 674, Lord Chancellor Sugden considered that there was no right to sue in equity upon such an instrument, containing express powers of distress and entry, which might be enforced at law, see *Doe d. Freeman v. Bateman*, 2 B. & A. 168. And the remedy for *actual* use and occupation, though under an invalid assignment, is of course not touched by the above controversy. See further Litt. §§ 214, 215, 216, 231, 232, and the Commentary; the notes to 2 Wms. Saunders, 418, c, d, e, et seq., and a note in Alcock & Napier, 258, containing an opinion of Mr. Justice Burton, the reasoning in which goes near, if not the whole way, to conclude the discussion.

SEMAYNE'S CASE.

MICH. 2 JAC. 1.—IN THE KING'S BENCH.

[REPORTED 5 COKE, 91.]

Sheriff when entitled to break doors—Application of maxim "Every man's house is his castle."

Co. Ent. 12,
pl. 11.
Mo. 968.
Yelv. 28, 29.
Cr. El. 908,
909. 2 Roll.
Rep. 294. See
the Report of
this Case in Sir
F. Moore, 668,
where it ap-
pears that there
was a division
of opinion
among the
Judges; and
the same ap-
pears in Croke,
908, and that
one of the dis-
sident Judges
withdrew his
opinion. Whe-
ther a bailiff,
&c., may break
a house to do
execution or
not, see 6 Mod.
105, &c., *ibid.*
See Hob. 263,
where the
parties were
punished for
executing the
process of
law in a riotous
manner.

IN an action on the case by Peter Semayne, plaintiff, and Richard Gresham, defendant, the case was such; the defendant and one George Berisford were joint-tenants of a house in Blackfriars in London, for years, George Berisford acknowledged a recognizance in the nature of a statute-staple* to the plaintiff, and being possessed of divers goods in the said house died, by which the defendant was possessed of the house by survivorship in which the goods continued and remained; the plaintiff sued process of extent on the statute to the sheriffs of London; the sheriffs returned the conusor dead, on which the plaintiff had another writ to extend all the lands which he had at the time of the statute acknowledged, or at any time after, and all his goods which he had at the day of his death; which writ the plaintiff delivered to the sheriffs of London, and told them that divers goods, which were the said George Berisford's at the time of his death, were in the said house: and thereupon the sheriffs, by virtue of the said writ, charged a jury to make inquiry, according to the said writ, and the sheriffs and jury *accesserunt ad domum prædictam ostio domus prædictæ aperto existen' et bonis prædictis in prædicta domo tunc existen'*, and they offered

[When a house may be pulled down as a private nuisance, *Perry v. Fitzhove*, 8 Q. B. 757; *Davis v. Williams*, 16 Q. B. 546.]

* See an account of this sort of recognizance, and the mode of proceeding thereon, 2 Wms. Saund. 70, in notis.

to enter the said house, to extend the goods according to the said writ: and the defendant *premissorum non ignarus*, intending to disturb the execution *ostia præd' domus tunc aperto existen', claudebat contra viscom' et jurator' præd'*; whereby they could not come, and extend the said goods, nor the sheriff seize them, by which he lost the benefit and profit of his writ, &c. And in this case these points were resolved:—

1. *That the house of every one is to him as his (a) castle and fortress as well for his defence against injury and violence, as for his repose; and although the life of a man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills (b) one per infortun', without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels,* for the great regard which the law has to a man's life; but if thieves come to a man's (c) house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3; Coron. 303 and 305; and 26 Ass. pl. 23. So it is held in 21 H. 7, 39; every one may assemble his friends and neighbours (d) to defend his house against violence: but he cannot assemble them to go with him to the market (e) or elsewhere for his safeguard against violence: and the reason of all this is, because domus sua cuique est tutissimum refugium.*

2. *It was resolved, when any house is recovered by any real action, or by eject' firmæ, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are, habere facias seisinam or possessionem, &c., and after judgment it is not the house, in right and judgment of law, of the tenant or defendant.*

3. *In all cases when the King (f) is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to*

(a) 3 Inst. 162.
Cr. El. 753.
2 Co. 32. a.
7 Co. 6. a.
8 Co. 126. a.
11 Co. 82. a.
1 Bulst. 146.
Stanf. Cor. 14. b.

(b) Co. Lit.
391. a.
Hale's Pl.
Cor. 32. Stanf.
Cor. 15. c. 16. d.

* [not so now.
See 24 & 25
Vict. c. 100,
s. 7.]

(c) 3 Inst. 56.
Stanf. Cor. 14.
a. Cor. 192.
3. E. 3.
Cor. 205, 330.
Br. Cor. 100.
1 Roll. Rep.
182.

22 H. 8. c. 5.
(d) 11 Co. 82. b.
Br. Riots, &c.
1. 21 H. 7. 39.
a. Fitz. Tresp.
246. 2 Inst.
161, 162.
(e) 11 Co. 82.
b. 1 Roll. Rep.
182.

(f) Benl. 112.
1 Bulst. 146.
Cr. El. 908,
909. Moor,
606, 668.
Yelv. 28, 29.
Cr. Car. 537,
538. 3 Inst.
234. 4 Leon.

161. Dy. 36. pl. 40. 12 Co. 131. 4 Inst. 177. Goldsb. 79. 2 Jones, 233, 41. 13 E. 4. 9. a.

make request to open the doors; and that appears well by the statute of Westminster, 1, c. 17 (which is but an affirmance of the common law), as hereafter appears, for the law without a default in the owner, abhors the destruction or breaking of any house (which is for the habitation and safety of man), by which great damage and inconvenience might ensue to the party, when no default is in him: for perhaps he did not know of the process, of which it he had notice, it is to be presumed that he would obey it; and that appears by the book in 18 E. 5. (a) Execut. 252, where it is said that the king's officer who comes to do execution, &c., may open the doors which are shut, and break them, *if he cannot have the keys*; which proves that he ought first to demand them. 7 E. 3. (b) 16). J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J. retreats into the house of T., they who pursue him, *if the house be kept and defended by force* (which proves that first request ought to be made), may lawfully break the house of T., for it is at the king's suit. 27 Ass. p. 66. The king's bailiff may distrain for issues (c) in a sanctuary. 27 (28) Ass. p. 35. By force of a *capias* on an indictment of trespass the sheriff may (d) break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it (that is on request made, or if he may open the door without breaking), he is a trespasser. 41 Ass. 15. On issue joined on a traverse of an office in Chancery, *Venire facias* was awarded returnable in the King's Bench, without mentioning *non (e) omittas propt' aliquam libertat'*: yet, forasmuch as the king is party, the writ of itself is *non omittas propt' aliquam libertat'*. 9 E. 4. 9; that for felony (f) or suspicion of felony, the king's officer may break the house to apprehend the felon, and that for two reasons: 1. for the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the king has interest, and where the king has interest the writ is *non omittas propter aliquam libertatem*; and so the liberty or privilege of a house doth not hold against the king.

(a) Yelv. 29.
5 Co. 92. b.
Cr. El. 909.
Moor, 668.

(b) 4 Inst. 177.

(c) Br. Distress
35. Br. Tres-
pass 151.

(d) Fitz. Tres-
pass 232. Br.
Trespass 248.

(e) Br. Prero-
gative le Roy
109. Br.
Franchise 18.
Br. Process
102. Fitz.
Prerogative 21.

(f) 13 E. 4.
9. a. Fitz.
Bar. 110.
4 Inst. 177.
1 Bulstr. 146,
2 Bulstr. 61.

4. *In all cases when the door is (a) open the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter into the house (b) and distrain for his rent or service.* 38 Hen. 6. 26. a. 8 E. 2 Distr. 21, and 33 E. 3. Avow, 256; the lord may distrain in the house, although lands are also held in which he may distrain. *Vide* 29 (c) Ass. 49. *But the great question in this case was, if by force of a Capias or Fieri facias at the suit of the party the sheriff, after request made to open the door, and denial made, might break the defendant's house, to do execution, if the door be not opened.* And it was objected that the sheriff might well do it for divers causes. 1. Because it is by process of law; and it was said, that it would be granted on the other side, that a house is not a liberty; for if a *Fieri facias* or a *Capias* be awarded to the sheriff at the suit of a common person, and he makes a mandate to the bailiff of a liberty who has return of writs, who *nullum dedit respons'*, in that case another writ shall issue with *non omittas propter aliquam libertatem*; yet it will be said on the other side that he shall not break the defendant's house, as he shall do of another liberty; for whereas in the county of Suffolk there are two liberties, one of St. Edmund Bury and the other of St. Ethelred of Ely, suppose a *Capias* comes at the suit of A. to the sheriff of Suffolk to arrest the body of B., the sheriff makes a mandate to the bailiff of the liberty of St. Ethelred, who makes no answer, in that case the plaintiff shall have a writ of *non omittas*, and by force thereof he may arrest the defendant within the liberty of Bury, although no default was in him. 2. Admitting it be a liberty, the defendant himself shall never take advantage of a liberty: as if the bailiff of a liberty be defendant in any action, and process of *Capias* or *Fieri facias* comes to the sheriff against him, the sheriff shall execute the process against him; for a liberty is always for the benefit of a stranger to the action. 3. For necessity the sheriff shall break the defendant's house after such denial as aforesaid, for at the common law a man

(a) 1 Brown,
50. Cr. Jac.
486.

(b) Br. Tres-
pass 226.
Br. Issue 26.

(c) Br. Dissei-
sor 52. Fitz.
Assize 286.

Lucas 290.

Cro. Jac. 555.

should not have any execution for debt, but only of the defendant's goods. Suppose then the defendant would keep all his goods in his house, the defendant himself, by his own act, would prevent not only the plaintiff of his just and true debt, but there would also be a great imputation to the law, that there should be so great a defect in it, that in such case the plaintiff by such shift without any default in him should be barred of his execution. And the book of 18 E. 2 (a), Execut. 252, was cited to prove it, where it is said, that it is not lawful for any one to disturb the king's officer who comes to execute the king's process ; for if a man might stand out in such a manner, a man would never have execution, but there it appears (as has been said) that there ought to be request made before the sheriff breaks the house. 4. It was said, that the sheriffs were officers of great authority, in whom the law reposed great trust and confidence, and are to be of sufficiency to answer for all wrongs which should be done ; and they had *custodiam comitatum*, and therefore it should not be presumed that they would abuse the house of any one, by colour of doing their office in execution of the king's writs, against the duty of their office, and their oath also. *But it was resolved, that it is not lawful for the sheriff (on request made and denial) at the suit of a (b) common person, to break the defendant's house, sc. to execute any process at the suit of any subject ;* for thence would follow great inconveniënce, that men as well as in the night (c) as in the day should have their houses (which are their castles) broke, by colour whereof great damage and mischief might ensue ; for by colour thereof, on any feigned suit, the house of any man, at any time, might be broke when the defendant might be arrested elsewhere and so men would not be in safety or quiet in their own houses. And although the sheriff be an officer of great authority and trust, yet it appears, by experience, that the king's writs are served by bailiffs, persons of little or no value : and it is not to be presumed that all the substance a man has is in his house, nor that a man would

(a) Yelv. 29.
5 Co. 91. b.
Moor, 668.
Cr. El. 409.
O. Benl. 121.
See 18 E. 4. 4.
contra.

The resolution
of the court.
(b) 1 Jones,
429, 430.
1 Brownl. 50.
1 Bulstr. 146.
Cr. Jac. 556.
O. Benl. 121.
4. Inst. 177.
Palm. 53.
Dyer, 36,
pl. 41. Moor,
668. Cr. Car.
537, 538. Cr.
El. 908, 909.
Yelv. 29.
Hob. 62, 263,
264. 4 Leon.
41. 11 Co. 82.
March. 34.
18 E. 4. 4. a.
Br. Execut.
100. Br. Tres-
pass 390.
(c) 9 Co. 66. a.
Cr. Jac. 80,
486. Jenk. Cent. 291. Hale's Pl. Cor. 45. Owen, 63.

lose his liberty, which is so inestimable, if he has sufficient to satisfy his debt. And all the said books, which prove that when the process concerns the king the sheriff may break the house, imply that at the suit of the party the house may not be broken : otherwise the addition (at the suit of the king) would be frivolous. And with this resolution agrees the book in (a) 13 E. 4. 9, and the express difference there taken between the case of felony, which (as has been said) concerns the commonwealth, and the suit of any subject, which is for the particular interest of the party, as there it is said. In (b) 18 E. 4. 4, a. by Littleton and all his companions it is resolved, that the sheriff cannot break the defendant's house by force of a *Fieri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good. And it was said, that the said book of (c) 18 E. 2. was but a short note, and not any case judicially adjudged, and it doth not appear at whose suit the case is intended, but it is an observation or collection (as it seems) of the reporter. And if it be intended of a *Quo (d) minus*, or other action in which the king is party, or is to have benefit, the book is good law.

5. *It was resolved, that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any (e) person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial on request made, the sheriff may break the house;* and this is proved by the statute of West. 1. c. (f) 17, by which it is declared, that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him, *i.e.*, conveyed to his house or castle to prevent the owner to have a replevin of his goods; which Act is but an affirmance of the common law in such points. But it appears there, that,

(a) 13 E. 4. 9.
a. 5 Co. 92. a
Fitz. Bar. 110.
4 Inst. 177.

(b) Cro. Eliz.
909. Yelv. 29.
Br. Execution
100. Br. Tres-
pass 309.

(c) 18 E. 2.
Execut. 252.
Yelv. 29.
Moor, 668.
Cr. El. 909.
5 Co. 91. b.
92 b.
Benl. 121.
(d) Plowd.
208. a.
2 Show. 87.

(e) Cr. Car.
544.

(f) 2 Inst.
192, 193, 194.

The distrainer.

before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him : for the words of the statute are, "after that the cattle shall be solemnly demanded by the sheriffs," &c.

6. It was resolved, admitting that the sheriff after denial made, might have broke the house, as the plaintiff's counsel pretend he might, then it follows that he has not done his (a) duty, for it doth not appear that he made any request to open the door of the house. Also the defendant, as this case is, has done that which he might well do by the law, *scil.* to shut the door of his own house.

(a) Stile, 447.
(b) Hard. 2.
1 Mod. Rep.
286. See Hol-
lingsworth v.
Brodrick, 7
A. & E. 40.

Lastly, the general allegation (b), *premissorum non ignarus*, was not sufficient in this case, where the notice of the premises is so material ; but in this case it ought to have been certainly, and directly, alleged ; for, without notice of the process of law, and of the coming of the sheriff with the jury to execute it, the shutting of the door of his own house was lawful. And judgment was given against the plaintiff.

ALTHOUGH the sheriff, as appears from this case, may justify (after request made) the breaking open the doors of a third person's house in order to execute the process of the law upon the defendant or his property, removed thither in order to avoid an execution, still he does so at his peril ; for, if it turn out that the defendant was not in the house, or had no property there, he is a trespasser. *Johnson v. Leigh*, 1 Marsh. 565, 6 Taunt. ; *Ratcliffe v. Burton*, 3 B. & P. 229 ; explained in *Hutchinson v. Birch*, 4 Taunt. 627 ; Com. Dig. Execution, C. 5. See *White v. Wilshire*, Palm. 52 ; 2

Rolle, 138 ; *Biscop v. White*, Cro. Eliz. 759 ; and judgment in *Cooke v. Birt*, 5 Taunt. 769. But his right to enter the defendant's own house does not depend on any such contingency, for that is the most natural place for the defendant or his goods to be. And on the same principle, where there is a judgment against an administratrix *de bonis testatoris*, and she marries, the sheriff may enter her husband's house to search for the goods of the testator. *Cooke v. Birt*, 5 Taunt. 771 ; and although the sheriff must not break open the outer door of the defendant's house in order to execute the pro-

cess (see *Kerbey v. Denbey*, 1 M. & W. 336), yet, having obtained admission to the house, he may justify the afterwards breaking open *inner* doors in order to execute the process, as he may cupboards, trunks, &c., *Lee v. Gansel*, Cowp. 1; *R. v. Bird*, 2 Show. 87; *Hutchinson v. Birch*, 4 Taunt. 619; see *Ratcliffe v. Burton*, 3 B. & P. 223. And the maxim, that "a man's house is his castle," only extends to his *dwelling-house*; therefore, a barn, or outhouse, not connected with the dwelling-house, may be broken open in order to levy an execution, *Penton v. Browne*, 1 Sid. 181, 186; but not to make a distress for rent, *Brown v. Glenn*, 16 Q. B. 254. And if the defendant, after being arrested, escape, the sheriff may break open either his own house, or that of a stranger, for the purpose of retaking him. *Anon.* 6 Mod. 105, Lofft. 390; vide *Lloyd v. Sandilands*, 8 Taunt. 250 [*Sandon v. Jervis*, 1 E. B. & E. 935; S. C. in error, *ib.* 942]. So, where a bailiff who has entered the house to distrain, or execute process, is forcibly ejected, he may break open the door in order to re-enter, *Eagleton v. Gutteridge*, 11 M. & W. 465; *Pugh v. Griffiths*, 7 A. & E. 838; *Aga Kurboolie Mahomed v. The Queen*, 4 Moore (Privy Council), 239 [*Bannister v. Hyde*, 3 El. & El. 627; 29 Law J., Q. B. 141]. It is above stated that the sheriff cannot justify breaking open the

outer door of a stranger's house, unless it prove that the defendant or his goods are actually there; if they be not there he will be a trespasser. This doctrine has been carried still farther; for it has been thought that he cannot, even though he may have grounds for suspicion, justify entering the dwelling-house of a third person, although he break no door, unless it prove in the event that the defendant or his goods were actually therein. In *Cooke v. Birt*, 5 Taunt. 765, Dallas, J., says, "The sheriff may enter the house of a stranger if the door be open; but it is at his peril whether the goods be found there or not; if they be not, he is a trespasser." The expressions of Gibbs, C. J., are to the same effect. In *Johnson v. Leigh*, 6 Taunt. 245, in trespass for breaking and entering the plaintiff's house, and breaking the *inner* doors, locks, &c., the defendant, as sheriff, justified entering under a *testutum capias*, against T. Johnson, the outer door being open, and there being reasonable and sufficient cause to suspect and believe, and the defendant suspecting and believing, that T. Johnson was in the house. On demurrer, Gibbs, C. J., said, "In *Hutchinson v. Birch*, 4 Taunt. 619, the goods were in the house, here the defendant only avers a suspicion that J. Thompson was in the house; I protest that the court have not decided this point, or dropt, in the case of *Hutchinson*

v. *Birch*, anything which favours the opinion, that it may not go abroad to the world that we have so decided." Leave was given to amend the plea. However it is apprehended that circumstances might exist, under which the sheriff would be justified in entering the house of a stranger on suspicion, though the defendant were not actually there. Supposing, for instance, that the defendant were on a visit with the stranger, the dwelling-house of the stranger would seem to be, *pro tempore*, the defendant's dwelling-house, so as to entitle the sheriff to enter it; upon the principle on which *Cooke v. Birt* was decided, namely, that of its being the place where it would be natural to expect the defendant, or his goods, to be. I have seen a plea framed on that idea; and indeed the point is virtually so ruled by *Sheere v. Brooks*, 2 H. Bl. 120, where it was held, that, when the defendant resided in the house of a stranger, the bail above might justify entering it in order to seek for him, the outer door being then open; for, said Lord Loughborough, "I see no difference between a house of which he is solely possessed, and a house in which he resides with the consent of another;" but the defendant must at least be residing in the stranger's house at the time. See *Moorish v. Murray*, 13 M. & W. 52, where a plea stating that "for six months next preceding the trespasses,"

the defendant "had resided" in the plaintiff's house was held insufficient, even after verdict. It seems to follow from this, that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal. There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger, upon bare suspicion, viz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house, for the purpose of favouring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff, who entered under the false supposition thus induced, as a trespasser; or, perhaps, such conduct might be held to amount to a licence to the sheriff to enter. See *Price v. Harwood*, 3 Camp. 108; *Walker v. Willoughby*, 6 Taunt. 530; and an anonymous case in Chitty's Gen. Prac. of Law, 1st Ed. vol. 3, p. 354, n. x.

As to the means by which an entry may be effected without being considered a breaking of the door, it has been held that a landlord may, in order to make a distress, open the outer door in the way in which other persons

using the building are accustomed to open it, *e. g.* where the door was fastened by a padlock attached to a movable staple, by pulling out the staple; and the Court of Exchequer in so deciding questioned the authority of the passage in Comyn's Digest, *Execution*, c. 9, that a sheriff cannot open the outer door, though it be only latched, and said that at all events that passage only applied to a *dwelling-house*, *Ryan v. Shilcock*, 7 Exch. 402, more fully reported 21 L. J., Exch. 55. In *Curtis v. Hubbard*, 1 Hill's New York Reports, 337, on the other hand, it was laid down that to make the sheriff a trespasser, it is enough that the outer door be shut; that merely opening is a breaking in law; that lifting a latch is as much a breaking in law as the forcing of a bolted door; and that whatever would be a breaking in burglary would be a breaking by the sheriff. It seems not altogether without difficulty to reconcile the dicta in *Ryan v. Shilcock* with the cases as to burglary (collected in Jervis's Archbold by Welsby, 13th edition, 406.) [If a pane in a window of the house is broken, but not by the officer, he may lawfully put his hand through the aperture in order to make the arrest: *Sandon v. Jervis*, 1 E. B. & E. 935; S. C. in error, *ib.* 942.]

The distinction taken in this case between process at the suit of the king and that of an individual, is recognised in *Burdett v.*

Abbott, 14 East, 157; *Larrock v. Brown*, 2 B. & A. 592; 2 Hale, P. C. 117; Foster on Homicide, p. 320.

It is laid down in the text, that, before the sheriff breaks the outer door of a stranger's house, in those cases in which he has a right to do so, he ought to demand admission; and this is also necessary when he breaks open the defendant's own doors in order to execute the process of the crown, *Larrock v. Brown*, 2 B. & A. 592; even in case of felony, 2 Hale, P. C. 117; Foster on Homicide, p. 320; or, in order to retake the defendant after an escape; see *Genner v. Sparks*, 1 Salk. 79; 6 Mod. 173; *White v. Wilshire*, 2 Rolle's Rep. 138. See Palm. 52, where the bailiffs were imprisoned, and the door broken to rescue them. On a similar principle in *De Gondouin v. Lewis*, 10 A. & E. 120, the court thought that before seizing contraband goods from the person the officers ought to demand them. But though it was considered in *Ratcliffe v. Burton*, 3 B. & P. 223, that admission should be demanded before breaking an *inner* door, the contrary was decided in *Hutchinson v. Birch*, 4 Taunt. 619. In *Pugh v. Griffiths*, 7 A. & E. 838, the sheriff's officer, under a *fieri facias*, had lawfully entered a house and seized goods there, and the outer door being locked upon him, he was held justified in breaking it open to carry away the goods, there being no one whom

he could request to open it. [There does not appear to have been any demand of entry in *Sandon v. Jervis*, 1 E. B. & E. 935, 942, where the sheriff's officer was held to have been justified in breaking open the outer door after having arrested the plaintiff under a *ca. sa.* by touching him through a hole in a window of the house.] In *Aga Kurboolie Mahomed v. The Queen*, 4 Moore (Privy Council), 239, a sheriff's officer in the execution of a bailable writ lawfully entered a house, but before he could arrest was forcibly expelled; he obtained assistance, and without demand of re-entry, broke open the outer door, re-entered, and made the arrest, the Judicial Committee of the Privy Council held the officer and his assistants justified. To use the pointed language of the judgment, which was delivered by Lord Campbell, "The outer door being open, they were entitled to enter the house under civil process, and they being lawfully in the house to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act."

The law upon this subject is so well, and at the same time briefly summed up by Sir Michael Foster, in his *Discourse of Homicide*, pp. 319, 20, that I cannot forbear inserting his account of it in his own words; it is as follows:—

"The officer cannot justify

breaking open an outward door or window in order to execute process in a civil suit, if he do he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door is opened to him from within, and he entereth, he may break open inward doors if he findeth that necessary in order to execute his process.

"The rule, that '*every man's house is his castle*,' when applied to arrests in legal process, hath been carried as far as the true principles of political justice will warrant; perhaps beyond what in the scale of sound reason and good policy, they will warrant. But this rule is not one of those that will admit of any extension; it must, therefore, as I have before hinted, be confined to the breach of windows, and outward doors, intended for the security of the house against persons from without endeavouring to break in.

"It must likewise be confined to a breach of the house in order to arrest the occupier, or any of his family, who have their domicile, their ordinary residence there; for, if a stranger, *whose ordinary residence is elsewhere*, upon a pursuit, taketh refuge in the house of another, this is not *his castle*, he cannot claim the benefit of sanctuary in it. [See *Watson on the Office of Sheriff*, 128.]

"The rule is likewise confined to cases of arrests, *in the first instance*; for, if a man being

legally arrested (and laying hold of the prisoner and pronouncing the words of arrest is an actual arrest) escapes from the officer and takes shelter, *though in his own house*, the officer may, upon fresh suit, break open doors in order to retake him ; having first given due notice of his business and demanded admission, and been refused.

"And let it be remembered that not only in this, but in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.

"The rule already mentioned must also be confined to the case of arrest upon process in civil suits ; for, where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him ; doors may, in any of these cases, be forced ; the notification, demand, and refusal before mentioned having been previously made. In these cases, the jealousy with which the law watches over the public tranquillity (a laudable jealousy it is), the principles of political justice, I mean the justice which is due to the community, *ne maleficia remaneant impunita*, all conspire to supersede every pretence of private inconvenience, and

oblige us to regard the dwellings of malefactors, when shut against the demands of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion."

It is laid down in the principal case that the sheriff breaking an outer door to do execution "is a trespasser by the breaking, and yet the execution which he then doth in the house is good." The authority referred to for this proposition is the Year Book of 18 E. 4, Pasch. 4 *a*. In that case, after *fieri facias* issued, the defendant locked up all his goods in his house, whereupon the sheriff broke open the outer door of the house, entered, and seized the goods ; and the question which appears to have been raised on a motion, though the form of the proceeding is not distinctly stated, was, whether the sheriff had done any wrong or not. "Littleton and all his companions held, that the party may have a writ of trespass against the sheriff for the breaking of the house, notwithstanding this *fieri facias*, for the *fieri facias* shall not excuse him of the breaking of the house, but of the taking of the goods only." It is laid down accordingly, in Bacon's Abridg-

ment, *Execution* (N), "that if the sheriff in executing a writ break open a door, where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action for trespass against the sheriff." This, so far as relates to an execution *against goods*, is consistent with the doctrine acted upon by the Court of Queen's Bench in *De Gondouin v. Lewis*, 10 A. & E. 120, where the defendant a custom-house officer, without demand, or any circumstance to justify the use of force, violently took contraband goods from the manual possession of the plaintiff. An action of trespass was brought for that seizure, not complaining of the assault. The Court of Queen's Bench held, that the fact of the goods being forfeited was an answer to that action, notwithstanding that, if the plaintiff had sued in trespass for an assault, there would have been no justification. And the reason of the thing, as well as the authority of Coke and of Littleton, seems to be with the decisions, for the execution creditor not taking part in the execution has been guilty of no wrong, and the maxim *nullus commodum capere potest de injuriâ suâ propriâ* (see Co. Litt. 148 b) is therefore not violated by holding so much of the acts of the sheriff as was for the benefit of the execution creditor valid, and the rest illegal. However, in *Yates v. Delamayne*, Trin. T., 17 Geo. 3,

Bacon's Abridgment, *Execution* (N), an execution against the goods is stated to have been set aside on the ground that the outer door had been illegally broken open for the purpose of making the seizure. That case, though hard it may be considered, if interfering with a strict legal right of the execution creditor, is perhaps not irreconcilable with the doctrine under discussion; because it is quite consistent with the validity of the execution in point of law, that the court, to prevent an abuse of its process and the danger of collusion between the execution creditor and the sheriff, should, in the exercise of its *summary* jurisdiction, undo the proceedings according to the principle acted on in *Barrett v. Price*, 9 Bing. 566, and other cases [and recognised in *Hooper v. Lane*, 6 H. of L. Cases, 448]. It is the practice, in like manner, to discharge persons taken under process against the person by means of an illegal entry into a dwelling-house; *Hodgson v. Towning*, W. W. & H. 53; 5 Dowl. 410, S. C. And there is authority for saying that an arrest of the *person* by means of an illegal breaking of the outer door, is altogether void, and that the sheriff is liable, in case of such arrest, not merely for the breaking and entering of the house, but also for the assault and imprisonment; for, in *Kerbey v. Denbey*, 1 M. & W. 336; Tyrw. & Gr. 688, S. C., to a declaration for breaking and

entering a house and assaulting and imprisoning the plaintiff, the defendant, amongst other pleas, pleaded, *except* as to the breaking and entering the house, a justification under a *capias ad satisfaciendum*, stating the arrest to have been in a dwelling-house, and the outer door to have been open. The Court of Exchequer held, that the fact of the outer door being open was a material averment, and that fact being disproved, that the judge was right in directing a verdict for the plaintiff on the plea of justification (which, it has been seen, was pleaded to the assault and imprisonment only), with damages for all the trespasses. This decision, if consistent with the doctrine in the principal case, points to a distinction between the cases of process against the goods and against the person, and one which may be thought to spring from the intention of the rule in *Semayne's Case*, viz., to preserve the security and repose of the person, an intention, directly, immediately, and entirely violated by the arrest of the body, whereas the seizure of the goods which are bound by the writ, and in which the execution creditor has [subject to the 19 & 20 Vict. c. 97, s. 1] an interest only defeasible, after the delivery of the writ to the sheriff, by a sale in market overt (see *Samuel v. Duke*, 3 M. & W. 622), may be considered as but an indirect and remote disturbance of the repose of the debtor. It may

be doubted, however, whether in *Kerbey v. Denbey* the Court of Exchequer meant to proceed upon such a distinction; and in Brooke's Abridgment, *Trespass*, 390, the result of the Year-book, 18 E. 4, P. 4 *a*, is stated thus, "Trespass, the sheriff cannot break house *or chest* to do execution by *fieri facias*; *per curiam*; but he may take the goods *or the body* for (pur) execution" (an abridgment which extends the original in two particulars, the first obviously erroneous), and the passage above referred to in Bacon's Abridgment is to the same effect. See, too, as to a distress, Viner's Abridgment, tit. *Replevin*, A, *a*. 8, 9. These observations must therefore be considered as merely suggestive upon a point which seems likely to be the subject of further discussion. Since the [third] edition of this work the point has been raised, but not decided, in *The Duke of Brunswick v. Slowman*, 8 C. B. 317; and in *Percival v. Stamp*, 9 Exch. 167, which latter case seems to be an authority in favour of the distinction above suggested between executions against the person and execution against goods.

It may here be added, that in a case like *Yates v. Delamayne*, *supra*, inasmuch as the seizure by the sheriff under a *fieri facias*, of goods to the value of the judgment debt, is said to operate by way of satisfaction (*Wilbraham v. Snow*, 2 Wms. Saund. 47 *a*, note (1), and

per cur. *Holmes v. Newlands*, 5 Q. B. 370 [not so a taking of the person under a *capias*, *O'Brien v. Lewis*, 32 L. J. Cha. 665], a question may arise as to the defence of the execution creditor to an *audita querelâ*, after the goods have been ordered to be restored to the execution debtor. [But it is said by Holt, C. J., in *Clerk v. Withers*, 6 Mod. 293 (to which the above note in Wms. Saund. refers), that the seizure does not discharge the debtor if the execution is afterwards avoided.] Probably the bringing of an *audita querelâ* would be considered as a breach of good faith, after a successful application to restore the goods [and the court or judge would refuse to allow the writ to issue; see Reg. Gen. Hil. T. 1853, r. 79, and *Deane v. Ker*, 4 Exch. 82]. If not, the alternative would be, to hold the sheriff liable to the execution creditor as upon a lawful seizure; and indeed in such a case it would perhaps be difficult to suggest what valid defence the sheriff could make. It would, however, be a wild sort of justice to make him pay the debt and costs by way of additional punishment of his illegal entry, for which he would, at all events, be liable to answer in damages to the debtor. At least it should seem that the jurisdiction exercised in *Yates v. Delamayne* (except in cases where the execution creditor has employed a special bailiff, or been privy to the illegal entry),

ought to be administered with great precaution.

[The case of *Hooper v. Lane*, 6 H. of L. Cases, 443, decided since the publication of the fourth edition of this work, has an important bearing upon the points discussed in the last two paragraphs. The facts of that case, so far as they are material, were as follows:—It was an action against the sheriff of Middlesex, for having neglected to arrest one Anthony Bacon under a writ of *ca. sa.* at the plaintiffs' suit. The defendants pleaded Not Guilty, and a denial that they could have arrested Bacon under the writ. The action was twice tried. At the first trial it was proved that the writ in question was delivered to the sheriff for execution in 1842; that in 1843 a void writ of *ca. sa.* against Bacon, at the suit of another person, had been put into the defendants' hands, and that under their warrant issued upon that document Bacon had been arrested, no warrant having been issued by them before that time on the earlier good writ; that Bacon had obtained a judge's order for his discharge from custody under the invalid writ, but, that before he had been actually discharged, the defendants had issued their warrant upon the plaintiffs' writ, and had claimed a right to detain Bacon under that writ. Bacon had then, without notice to the plaintiffs, obtained a second order for his discharge, and, being let

out of custody; had escaped from the country. The judge who tried the case (Lord Denman) ruled that there had been no valid arrest; that the defendants were not justified by the judge's order in the course they had pursued; and that if the jury believed the facts above stated, the defendants had in point of law been guilty of negligence. This ruling was supported on a bill of exceptions by the Exchequer Chamber, and the case having been sent down to a new trial, in consequence of other objections which it is not necessary to state here, the jury were again directed in the same way, and they found a verdict for the plaintiffs *for the whole amount of the debt*. A second bill of exceptions was tendered, and the case was taken up to the House of Lords, where the judgment of the Exchequer Chamber was affirmed. In the House of Lords considerable difference of opinion existed among the judges who gave their opinions upon the case. Of the five judges who were of opinion that the verdict ought to be upheld, three (Mr. Justice Coleridge, Mr. Justice Cresswell, and Mr. Justice Crowder) referred to the passage cited above from the Year-book of 18 Ed. 4. The two former doubted its authority, and all three of them adopted the distinction suggested above as to the difference between executions against goods and executions against the body effected by means of a

wrongful act. Mr. Justice Coleridge said, "It may be doubted whether the judges meant anything more in the Year-book than to state, generally, what a *fi. fa.* authorised the sheriff to do; but assuming that they did, still the dictum there and that in *Semayne's Case* are both purely extra judicial." The only peer who expressed an opinion was the Lord Chancellor (Lord Cranworth). He adopted the view taken by the Exchequer Chamber. "It is contended," said his lordship, "that the party who has put a writ for execution into the sheriff's hands has a right to say that, as to him, the sheriff is an agent bound to execute the writ by himself, or a competent officer as his deputy, and that it is no answer to say that another officer of the sheriff, in another action, has acted illegally. But the answer is, that the sheriff, though for some purposes an agent of the party who puts the writ into his hands, is not a mere agent. He is a public functionary, having, indeed, duties towards those who set him in motion, analogous, in many respects, to those of an agent towards his principal, but *he has also duties towards others, and particularly towards those against whom the writs in his hands are directed*. Therefore it is that arguments drawn from the execution of writs of *fi. fa.*, for example, have little bearing upon the present case. If a sheriff, in exe-

cutting a writ of *feri facias*, acts illegally, by breaking open an outer door, and then seizes the goods of the defendant in the house, this may give a right of action to the person injured by the illegal breaking; and yet the sheriff may, if the law be correctly laid down in the case cited from the Year-books, be entitled to sell the goods. There is no analogy between such a case and that of the unlawful seizure of the person. The goods cannot complain; they are not injured by the wrongful act; the sheriff had no duty to perform towards the goods, but only towards their owner. And this shows that no reasoning

drawn from decisions on writs of *feri facias* can apply to cases where the arrest of the person is in question. . . . To allow the sheriff to make such an arrest while the party is unlawfully confined by him, would be to *permit him to profit by his own wrong*, and therefore cannot be tolerated. He cannot arrest him, because he has already deprived him of his liberty; he cannot detain him, because he is entitled to be discharged." See *Ockford v. Freston*, 6 H. & N. 466; S. C. 30 L. J. Exch. 89; but also *Bateman v. Freston*, *ibid.* Q. B. 133: *Ex parte Freston*, *ibid.* Cha. 460.]

CALYE'S CASE.

PASCH. 26 ELIZ.—IN THE KING'S BENCH.

[REPORTED 8 COKE, 32.]

Liability of Innkeepers.

IT was resolved, *per totam curiam*, that if a (a) man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it; for the words of the writ which lieth against the hostler are *Cum secundum legem et consuetud' regni nostri Angliæ* (b) *hospitatores qui hospitia com' tenent ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes,* et in eisdem hospitantes, eorum bona et catulla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipsius A. precii 40s. infra hospitium ejusdem B., &c., inventum pro defectu ipsius B. ceperunt, &c. Vide Registr. fol. 105, inter Brevia de Transgr' and F. N. B. 94, a. b., by which original writ (which is in such case the ground of the common law) all the cases concerning hostlers may be decided. For, 1, It ought to be a (c) common inn; for if a man be lodged with another (who is not an innholder) upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it; for the words are *hospitatores qui com' hospitia tenent, &c.* And so are the books in (d) 22 Hen. 6, 21.*

(a) 1 Roll. 3, 4.
4 Leon. 96.
2 Brownl. 255.

(b) Plowd. 9. b. the Register is false printed, scilicet, Distractione pro subtractione. F. N. B. 94. a. & b. Book of Entries, tit. Hosteler, f. 366 & 377. 1 And. 29. 3 Keb. 78. Dyer, 266. b. * [See *Allen v. Smith*, 12 C. B. N. S. 533.]

(c) 1 Roll. 2d. 1. Dr. & Stud. 137. b. Hob. 245. (d) Fitz. Hosteler 2. Br. Action sur le Case, 53.

- (a) 22 Hen. 6, b. (a) 38. (b) 2 Hen. 4. 7. b. (c) 11 Hen. 4, 45, a. b. (d) 42 38. b. Fitz. Hosteler, 1 B. Ass. pl. 17. (e) 42 E. 3. 11. a. 10 El. (f) Dyer, 266 ; Action sur le Case, 59. 5 Mar. Dyer, 158, (g). And the writ need not mention that the defendant keeps *commune hospitium*, for the words of the writ in the Register, are *infra hospitium ejusdem B.*, but it is to be so intended in the writ ; for the recital of the writ is, *hospitatores qui communia hospitia tenent, &c.*, and the one part ought to agree with the other, and the latter words depend on the other, and the plaintiff ought to *declare* that he keeps *commune hospitium* : and so the said books in (h) 22 Hen. 6, 21 (i) 11 Hen. 4, 5. a. b. 40 Eliz. Dyer (j) 266, &c., are well reconciled.
2. The words are *ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes* ; by which it appears that common inns are instituted for passengers and wayfaring men ; for the Latin word for an inn is, *diversorium*, because he who lodges there is *quasi divertens se a via* ; and so *diversorium*. And therefore, if a (k) neighbour, who is no traveller, as a friend, at the request of the innholder lodges there, and his goods be stolen, &c., he shall not have an action : for the writ is *ad hospitandos homines, &c., transeuntes, in eisdem hospitantes, &c.*
3. The words are, *eorum bona et catalla infra hospitia illa existentia, &c.* So that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are *infra hospitium*. And because the horse which at the request of the owner is put to pasture, is not *infra hospitium*, for this reason the innholder is not bound by law to answer for him, if he be stolen out of the pasture ; for the thing with which the hostler shall be charged ought to be *infra hospitium* ; and therewith agree the books in (l) 11 Hen. 4, 45, a. b. 22 Hen. 6. 21, b. 42 E. 3. 11 a. b. 42 Ass. pl. 17, where Knivet, C. J., saith, that the innholder is bound to answer for himself, and for his family, of the chambers and stables, for they are *infra hospitium* : and with this resolution in this point agreed the opinion of the Justices of Assize
- (a) 22 Hen. 6, b. (a) 38. (b) 2 Hen. 4. 7. b. (c) 11 Hen. 4, 45, a. b. (d) 42 38. b. Fitz. Hosteler, 1 B. Ass. pl. 17. (e) 42 E. 3. 11. a. 10 El. (f) Dyer, 266 ; Action sur le Case, 59. 5 Mar. Dyer, 158, (g). And the writ need not mention that the defendant keeps *commune hospitium*, for the words of the writ in the Register, are *infra hospitium ejusdem B.*, but it is to be so intended in the writ ; for the recital of the writ is, *hospitatores qui communia hospitia tenent, &c.*, and the one part ought to agree with the other, and the latter words depend on the other, and the plaintiff ought to *declare* that he keeps *commune hospitium* : and so the said books in (h) 22 Hen. 6, 21 (i) 11 Hen. 4, 5. a. b. 40 Eliz. Dyer (j) 266, &c., are well reconciled.
- (b) Fitz. Hosteler, 4 Br. Action sur le Case, 28. Br. Action sur le Statute, 39. that the defendant keeps *commune hospitium*, for the words of the writ in the Register, are *infra hospitium ejusdem B.*, but it is to be so intended in the writ ; for the recital of the writ is, *hospitatores qui communia hospitia tenent, &c.*, and the one part ought to agree with the other, and the latter words depend on the other, and the plaintiff ought to *declare* that he keeps *commune hospitium* : and so the said books in (h) 22 Hen. 6, 21 (i) 11 Hen. 4, 5. a. b. 40 Eliz. Dyer (j) 266, &c., are well reconciled.
- (c) Br. Action sur le Case, 41. Br. General Brief, 16. Fitz. Hosteler, 5. and the plaintiff ought to *declare* that he keeps *commune hospitium* : and so the said books in (h) 22 Hen. 6, 21 (i) 11 Hen. 4, 5. a. b. 40 Eliz. Dyer (j) 266, &c., are well reconciled.
- (d) Br. Action sur le Case, 86. Palm. 523. 1 Roll. 3. reconciled.
- (e) Fitz. Hosteler, 6 Br. Action sur le Case, 15. Statham, Action sur le Case, 6.
- (f) Dyer, 266, pl. 9. Postea, 33. a. 3 Keb. 73.
- (g) Dyer, 158, pl. 52. 1 And. 29, 30. 3 Keb. 73. 1 Roll. 3, 4.
- (h) Ante, 32. a. Fitz. Hosteler, 2 Br. Action sur le Case, 58.
- (i) 1 Roll. 4. Br. Action sur le Case, 41.
- (j) Dyer, 226, pl. 9. 3 Keb. 73.
- (k) 1 Roll. 3. E. 4. 2 Brownl. 254.
- (l) 1 Roll. 4,

(viz., the two Chief Justices Wray and Anderson) in the county of Suffolk in Lent vacation, 26 Eliz.—that an (a) (a) 1 Roll. 3, 4.
innholder lodges a man and his horse, and the owner ⁴ Leon. 96.
requires the horse to be put to pasture, and there he is ² Brownl. 255.
stolen, the innholder shall not answer for him. (b) But (b) 1 Roll. 3, 4.
it was held by them, that if the owner doth not require it, ⁴ Leon. 96.
but if the innholder of his own head puts his guest's horse ² Brownl. 225.
to grass, he shall answer for him if he be stolen, &c.
And it is to be observed, that this word *hostler* is derived
ab hostile; and *hospitator*, which is used in writs for an
innholder, is derived *ab hospitio*, and *hospes est quasi* * [It is not
hospitium petens. necessary that
the declaration
should allege in
terms that the
goods were lost
by the default
of the inn-
keeper, and the
3 & 4 Will. 4.
c. 40, s. 2,
applies so as to
render the
action main-
tainable against
the innkeeper's
executors.
Sem. it may
be either in
case or assump-
sit, *Morgan v.*
Ravey, 6 H. &
N. 265; gene-
rally as to
when a pro-
mise may be
implied to per-
form a duty,
see *Boorman*
v. Brown, 11
Cl. & Fin. 1;
Courtenay v.
Erie, 10 C. B.
73; S. C. 20
L. J. C. P. 7.]

4. The words are *ita quod pro defectu * hospitator' seu*
servientium suorum, &c., hospitibus hujusmodi damn' non
eveniat, &c., by which it appears that the innholder shall
not be charged, unless there be a default in him or his
servants, in the well and safe keeping and custody of their
guest's goods and chattels within his common inn; for
the innkeeper is bound in law to keep them safe without
any stealing or purloining; and it is no excuse for the
innkeeper to say, that he delivered the (c) guest the key
of the chamber in which he is lodged, and that he left the
chamber-door open; † but he ought to keep the goods and
chattels of his guest there in safety; and therewith agrees
22 Hen. 6, 21 b.; 11 Hen. 4, 45 a. b.; 42 Edw. 3, 11 a.
And although the guest doth not deliver his goods to the
innholder to keep, nor acquaints him with them, yet if
they be carried away, or stolen, the innkeeper shall be
charged, and therewith agrees 42 Edw. 3, 11. a. And
although they who stole or carried away the goods be
unknown, yet the innkeeper shall be charged. 22 Hen. 6,
38. 8 R. 2, Hostler 7. *Vide* 22 Hen. 6, 21. But if the (c) Moor, 78.
guest's servant, or he who (d) comes with him, or he
whom he desires to be lodged with him, steals or carries
away his goods, the innkeeper shall not be charged; for
there the fault is in the guest to have such a companion
or servant; and the words of the writ are, *pro defectu*
hospitator' seu servientium suorum. *Vide* 22 Hen. 6,
21. b. But if the innkeeper appoints one to lodge with ^(d) Cro. El.
285.

him, he shall answer for him as it there appears. The
 (a) Moor, 158. innkeeper (a) requires his guest that he will put his goods
 in such a chamber under lock and key, and then he will
 warrant them, otherwise not, the guest lets them lie in an
 outer court, where they are taken away, the innkeeper
 * Vide Salk. shall not * be charged, for the fault is in the guest, as it is
 19. held 10 Eliz. Dyer, 266.

5. The words are *hospitibus damnum non eveniat*;
 these words are general, and yet forasmuch as they depend
 on the precedent words they will produce two effects, viz.,
 1. They illustrate the first words. 2. They are restrained
 by them: for the first words are, *eorum bona et catalla*
infra hospitium illa existentia absque subtractione custo-
dire, &c. which words (*bona et catalla*) by the said words
ita quod, &c., hospitibus damnum non eveniat, although
 (b) 2 Roll. 58. they do not of their proper nature extend to (b) charters
 22 E. 4. 12.
 a. b. and evidences concerning freehold or inheritance, or (c)
 (c) Dy. 5. pl. 2. obligations, or other deeds or specialties, being things in
 2 Roll. 58.
 Yelv. 68. action, yet in this case it is expounded by the latter words
 to extend to them; for by them great damages happen to
 the guest: and therefore if one brings a bag or chest, &c.,
 of evidences into the inn, or obligations, deeds, or other
 specialties, and by default of the innkeeper they are taken
 away, the innkeeper shall answer for them, and the writ
 shall be *bona et catalla* generally; and the declaration
 shall be special. 3. These words, *bona et catalla*, restrain
 the latter words to extend only to moveables: and there-
 fore, by the latter words, if the guest be beaten in the inn,
 the innkeeper shall not answer for it; for the injury ought
 to be done to his moveables, which he brings with him;
 and by the words of the writ, the innholder ought to keep
 the goods and chattels of his guest, and not his person;
 and yet in such case of battery, *hospiti damnum evenit*,
 but that is restrained by the former words, as hath been
 said. And these words aforesaid, *absque subtractione seu*
amissione, extend to all moveable goods, although of them
 felony cannot be committed; for the words are not *absque*
felonica captione, &c., but *absque subtractione*, which

may extend to any moveables, although of them (a) felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, &c.*

(a) 3 Inst. 109.
10 E. 4. 14. a.
Fitz. Endict.
19. Br. Coron.
155.

(If a horse is at livery,† and eats more than he is worth, * an action lies against the owner; but the horse cannot be used or sold, Moore, 876, 877; but by the custom of London and Exeter the horse may be sold; but see Popham, 127, *Robinson v. Waller*.)

* [See *R. v. Watts*, Dears. C. C. 326; S. C. 23 Law J. M. C. 56. As to larceny of written instruments, see the

Larceny Consolidation Act, 24 & 25 Vict. c. 96, ss. 1, 27, 29, 30.] † [See as to this term the argument in *Allen v. Smith*, 12 C. B. N. S. 638.]

THIS is the leading case upon the subject of the liabilities of innkeepers in respect of their guests' property. [Those liabilities have been diminished by a statute passed in 1863 "respecting the liability of innkeepers, and to prevent frauds on them," the 26 & 27 Vict. c. 41. This act saves them from liability to make good to any guest of theirs "any loss of or injury to goods or property, brought to their inns, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than 30*l.*, except: (1) where such goods or property shall have been stolen, lost, or injured, through the wilful act, default, or neglect of such innkeeper, or any servant in his employ: (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper;" provided that in case of such deposit they may require as a condition of their liability that the property shall be deposited in a box or other

receptacle, fastened and sealed by the person depositing it, (s. 1). By sect 2, they are not to have the benefit of the act in respect of property which they refuse to receive for safe custody, or which, by their default, the guest is unable to deposit with them. Sect. 3, requires them to cause at least one copy of sect. 1, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to the inn, and gives them the benefit of the act only in respect of goods brought to the inn while the copy is so exhibited. Sect. 4, interprets "inn" and "innkeeper."

In a case subsequent to Calye's] goods belonging to a factor were lost, out of a private room in the inn, chosen by the factor for the purpose of exhibiting them to his customers for sale, the use of which was granted to him by the innkeeper, who, at the same time, told him that there was a key, and that he might lock the door, which the guest however neglected to do, although on two occasions, while

he was occupied in showing part of the goods to a customer, a stranger had put his head into the room. The judge, Richards, C. B., told the jury, that *primâ facie* the innkeeper was answerable for the goods of his guest in his inn, but that the guest might, by his own conduct, discharge him from responsibility, and left it to them to say whether he had done so here: the jury found that he had: and, on a motion for a new trial, the court approved of the direction of the learned judge, and thought the verdict was correct. "The law," said Lord Ellenborough, "obliges the innkeeper to keep the goods of persons coming to his inn, *causâ hospitandi*, safely, so that, in the language of the writ, *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo* But there may no doubt be circumstances, as where the guest, by his own misconduct, induces the loss, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*. Now, let us consider, 1st, whether the plaintiff came to the inn *causâ hospitandi*; and, 2dly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping-room, but I think we may presume he had, but he desires a private room up some steps in order to show his goods. Now, an innkeeper is not bound by law to find show-rooms for his guests, but only convenient lodging-rooms and lodging. As to

what is laid down in *Calye's Case* respecting the delivery of the key to the guest, it plainly relates only to the chamber-door in which he is lodged; and I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper The cases," continues his lordship, "show that the rule is not so inveterate against the innkeeper, but that the guest may exonerate him by his fault, as if the goods are carried away by the guest's servant, or the companion whom he brings with him, for so it is laid down in *Calye's Case*. Now, what is the conduct of the plaintiff in this case? The innkeeper, not being bound to find him more than lodging, and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose of exposing in it his wares to view, and introducing a number of persons over whom the innkeeper can have no check or control, and thus for a purpose wholly alien from the ordinary purpose of an inn, which is *ad hospitandos homines*. Therefore, the care of these goods hardly falls within the limits of the defendant's duty as innkeeper. Besides, after the circumstances relating to the stranger took place, which might well have awakened the plaintiff's suspicion, it became his duty, *in whatever room he might be*, to use, at least,

ordinary diligence; and particularly so, as he was occupying the chamber for a special purpose: *for though, in general, a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care.* It seems to me that the room was not merely entrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to exercise ordinary care in the safe keeping of his goods, and it is owing to his neglect, and not to the fault of the innkeeper, that the accident happened; and this was a question proper to leave to the jury." *Burgess v. Clements*, 4 M. & S. 306, *accord.* *Farnworth v. Packwood*, 1 Stark. 249. So where the defendant's ostler placed the plaintiff's horse in a stable with another horse that kicked him, and the defendant to rebut the presumption of negligence gave evidence to show that the horse had been properly taken care of; the judge, Cresswell, J., told the jury that the defendant was liable, if he or his servants had been guilty of direct injury or of negligence, otherwise not; the jury found for the defendant; and the court (though they held that evidence of any damage or loss of the goods of a guest *prima facie* raises a presumption of negligence in the innkeeper,)

considered the direction proper. *Dawson v. Chamney*, 5 Q. B. 164. [But see *Morgan v. Ravey*, 6 H. & N. 265; S. C. 30 L. J. Exch. 131, where the court distinguished and explained *Dawson v. Chamney* and laid down that the innkeeper is liable where there is a loss not arising from the guest's negligence, the act of God or the Queen's enemies. According to the register he is only liable "*pro defectu*," but it will be observed, that his duty is stated there to be "*absque subtractione seu amissione custodire die et nocte*."] And in *Armistead v. Fuller*, 17 Q. B. 261, where a cash-box easily opened had been left in the commercial room of an inn, under circumstances showing gross negligence in the guest, the jury were directed that *gross* negligence on the part of the guest would relieve the innkeeper from his common law liability, and the jury having found for the defendant, on the ground that the plaintiff had been guilty of gross negligence, the verdict was upheld, Lord Campbell observing, that he doubted if it were necessary to show gross negligence. But in another case, where a traveller went to an inn with several packages, one of which was, by his desire, taken into the commercial room, into which he was shown, and the others into his bed-room, which, according to the usual practice of that inn, was the place to which goods were taken, unless

orders were given to the contrary, and the package taken into the commercial room was stolen, the innkeeper was held responsible, and Holroyd, J., distinguished the case from *Burgess v. Clements* by saying, that there the plaintiff asked to have a room which he used for the purposes of trade, *not merely as a guest in the inn.* *Richmond v. Smith*, 8 B. & C. 9. See the explanation of this case in *Armistead v. White*, 17 Q. B. 261. So in *Kent v. Shuckard*, 2 B. & A. 803, the plaintiff and his wife, with Miss S., arrived at the defendant's inn, and took a sitting-room and two bed-rooms so situated that, the door of the sitting-room being open, a person could see the entrances into both bed-rooms. On the following day the plaintiff's wife went into the bed-room, and laid on the bed a reticule, which contained money, and returned into the sitting-room, leaving the door between that and the bed-room open. About five minutes afterwards she sent Miss S. for the reticule, which was not to be found. The innkeeper was held responsible for it, and it was held that there was no distinction between money and goods as to the liability of innkeepers. So when the plaintiff drove his gig to the defendant's inn on Bewdley fair-day, and asked whether there was room for the horse, the ostler of the defendant took the horse out of the gig and put him into a stable, and the plaintiff carried

his coat and whip from the gig into the house, and took some refreshment there, the ostler placed the gig outside of the inn-yard, in a part of the open street in which the defendant was in the habit of placing the carriages of his guests on fair-days. The gig was stolen thence; and the court held the innkeeper responsible, for it did not appear that the defendant put the gig in the street at the request or instance of the plaintiff: the place was, therefore, a part of the inn, for the defendant by his conduct treated it as such. If he wished to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it. *Jones v. Tyler*, 1 A. & E. 522. [It is not necessary in order to exonerate the innkeeper that he should establish that the guest was guilty of gross negligence (if this term is used in the sense of greater negligence than the mere want of ordinary care); the innkeeper is not liable if the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man might be reasonably expected to take under the circumstances. See the judgment of the Court of Queen's Bench in *Cashill v. Wright*, 6 E. & B. 891.]

It is not necessary, in order that a man may be a guest, so as

to fix the innkeeper with this sort of liability, that he should have come for more than a temporary refreshment, *Bennett v. Mellor*, 5 T. R. 273; and in *York v. Grindstone*, 1 Salk. 388, 2 Lord Raym. 860, three judges held, against Lord Holt's opinion, that if a traveller leave his horse at an inn, and lodge elsewhere, he is, for the purpose of this rule, to be deemed a guest; "because," said they, "it must be fed, by which the innkeeper hath gain; otherwise if he had left a dead thing." But it is clear that if the innkeeper receive goods as a bailee, and not in the character of an innkeeper, they do not fall within it. *Hyde v. Mersey and Trent Navigation Company*, 5 T. R. 389; *Jelly v. Clarke*, Cro. Jac. 188; Bac. Abr. *Inns*, C. 5. *Williams v. Gesse*, 3 Bing. N. C. 849. The length of time for which the guest has resided seems not to affect his right as such, provided he live there in the transitory condition of a guest. But if he came on a special contract to board and lodge there, the law does not consider him a guest, but a boarder, Bac. Abr. *Inns*, C. 5; *Parkhurst v. Foster*, Salk. 388. And in *Smith v. Dearlove*, 6 C. B. 132, where an innkeeper received a carriage and horses to stand at livery, the circumstances that afterwards, whilst they were there, the owner took occasional refreshment at the inn, and also for a time had a friend supplied with lodging and refreshment there on

his credit, were held insufficient to give the innkeeper a lien on the carriage and horses for his charges, since that right depends upon the fact that the goods come into the innkeeper's "possession in his character of innkeeper as belonging to a guest."

[In *Morgan v. Ravey*, 6 H. & N. 265, the plaintiff was staying at the Great Northern Railway Hotel, London. In his bed-room was hung up a notice, that in consequence of several robberies having taken place at night in London hotels, the proprietor requested visitors to bolt their bed-room doors, and leave their valuables at the bar, otherwise he would not be responsible. This notice plaintiff saw, but swore he only read the word "notice." He did not bolt his bed-room door (because, as he said, he did not know how), nor did he leave his gold watch and ring and other valuables at the bar; and next morning they were gone, and the jury at the trial of an action for the loss, having found that there was no negligence on his part, the Court refused to disturb the verdict.]

The definition of an inn is "a house where the traveller is furnished with everything he has occasion for while on his way." *Thompson v. Lacy*, 3 B. & A. 283. See Bac. Abr. *Inns*, B.; Burn's Justice, title *Alehouse*; but a mere coffee-house is not an inn, at least not within the meaning of a fire policy. *Doe v. Laming*, 4

Camp. 77. Nor is a boarding-house, *Dansey v. Richardson*, 3 E. & B. 144. [As to lodging-houses, see *Holder v. Soulby*, 8 C. B. N. S. 254.]

As to the duties of innkeepers in receiving guests, &c., see *Fell v. Knight*, 8 M. & W. 269; *R. v. Ivens*, 7 C. & P. 213; *Hawthorn v. Hammond*, 1 Car. & Kir. 404.

As to the lien of innkeepers for their charges, the better opinion appears to be, that it attaches to goods brought to the inn by a guest though they be not his own. *Robinson v. Waller*, 3 Bulst. 269; 1 Roll. Rep. 449 n., S. C.; *Johnson v. Hill*, 3 Stark. 172; *Turrill v. Crawley*, 13 Q. B. 197. [That it does attach to the goods of another person which the guest brings to the inn in the ordinary way, has been decided by *Snead*

v. Watkins, 1 C. B. N. S. 267.] But not to goods the property of a third person sent to the guest in the inn for temporary use, *e. g.*, a piano upon hire, *Broadwood v. Granara*, 10 Exch. 417. [Occasional absences *animo revertendi* during a long stay will not defeat the lien, *Allen v. Smith*; 12 C. B. N. S. 638; see also *Day v. Bather*, 2 H. & C. 14, where the plaintiff left his horse at an inn and went away for a fortnight, and a third person during that time having driven the horse out and injured it, the innkeeper was held liable for the injury.] The vulgar error that an innkeeper might detain the person of his guest until payment of his bill, was exploded in the case of *Sunbolfe v. Alford*, 3 M. & W. 248.

TAYLOR v. COLE.

EASTER TERM, 1789.

[REPORTED 3 TERM REPORTS, 292.]

In trespass for breaking and entering the plaintiff's house and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation: therefore a justification as to the breaking and entering will cover the whole declaration.

A person having a right of possession may enter peaceably, and being in possession may retain it without first establishing his right by action. If the assertion of his right be accompanied by a breach of the peace, that is the proper subject of criminal prosecution.

THIS was an action of trespass; the first count in the declaration was for breaking and entering the plaintiff's house, and expelling him; and the second count was for expelling the plaintiff from the occupation of his house. Pleas, 1st, the general issue to the whole declaration; 2ndly, as to the breaking and entering in the first count; the defendant justified as sheriff of *Middlesex*, under a *fiery facias* at the suit of *Joseph Hayling*; and 3rdly, as to the expulsion in the second count, he justified under a *fiery facias* at the suit of *R. B. Sheridan*; in which plea, after stating the delivery of the writ to him as sheriff, he stated that at the time of the execution of the writ the plaintiff was possessed of a certain interest in the residue of a certain term of years then to come and unexpired in the said house, called the King's Theatre or Opera House, in which, &c., and that by virtue of the said writ he seized

and took the said interest of the said plaintiff of and in the said residue of the said term of years then to come and unexpired in the said house, and duly sold and assigned the said interest, &c., under and by virtue of the said writ to T. Harris; who afterwards entered into the said house, &c., the door of the said house then being open, and peaceably and quietly expelled the plaintiff, &c. The plaintiff took issue upon the first plea, and demurred generally to the two last.

(a) On a former day, Wood moved to alter the verdict according to the evidence, and to enter up a verdict on that point which was not justified, namely, the expulsion in the first count: which the Court refused for the same reasons which they afterwards gave in delivering their judgment on the demurrer.

On the trial at the Westminster sittings before Lord Kenyon, a verdict was entered *generally* (a) on the whole record.

Wood now argued in support of the demurrer. The last plea is bad, because the sheriff could not justify the expulsion, even though the plaintiff had an immediate interest in the premises; still less can the present justification be supported, since it is not stated *what* interest the plaintiff had. It is not alleged that the plaintiff was possessed of the Opera House *for a term* of years; but merely that he had *an interest* in it. Now he might have an interest which would not justify the sheriff in turning him out; for if the plaintiff, having a term of years, made a mortgage for a less term than his own, and were in possession with the consent of the mortgagee, in that case he would have an equity of redemption, an interest which the sheriff might have sold, but yet such an interest as would not have justified the expulsion. Or suppose he had an annuity payable out of the Opera House, the sheriff might have sold the annuity, but could not justify the expulsion. And if he could have *any* interest at all which would not justify the sheriff in turning him out, it is a fatal objection to this plea. But even supposing that the plaintiff had a term of years, it was held by the Court in *R. v. Deane* and others (b), upon a motion for restitution to a possession, ‘That if a sheriff on a *feri facias* do sell a lease or term of a house, he cannot and must not put the person out of possession, and the *vendee* in; but the vendee must bring his ejectment.’ Here then the sheriff might have sold the plaintiff’s interest in the Opera House, and the vendee

(b) 2 Show. 85.
3 Atk. 739.

should have brought an ejectment to recover possession. And great inconvenience would ensue, if the sheriff were enabled to expel under a *feri facias* as well as to sell the term. The first plea of justification is also bad : for whenever a person has any authority by law to do any particular act, and he abuses that authority, he makes himself a trespasser *ab initio*. The *Six Carpenters' Case*, 8 Rep. 146, and *Reed v. Harrison*, 2 Bl. Rep. 1218. . The statute 11 Geo. 2, c. 19, which enacts that for any irregularity in a distress the landlord shall not be deemed a trespasser *ab initio*, is strong also to show what the common law on this subject is. Then in this case the sheriff was a trespasser ; for though he was justified in entering and selling, yet he was not in *expelling* the plaintiff, which makes him a trespasser *ab initio*.

Gibbs contrà.—As to the second plea of justification : it is stated that the plaintiff had an interest in a term of years, which was not then expired ; and, whatever interest that was, the sheriff was entitled to take it under the *feri facias*. In *Palmer's Case* (a) it was held unnecessary for (a) 4 Rep. 74. the sheriff to state in an assignment of a term under a *feri facias* the interest which the party had ; and that it was sufficient to state *generally* that he sold *all the interest* which the party had. And the reason there given is, “that the sheriff cannot have precise knowledge of the certainty of the beginning and the certainty of the end of the term.” So in this case it was also unnecessary for the sheriff, who justified under the *feri facias*, to state more particularly what interest the plaintiff had in the term. If he had no interest, he might have taken issue on that fact. Then it is objected that even if it had been stated correctly that the plaintiff had such an interest as would justify the sheriff in entering to sell it, yet that he could not justify *expelling* the plaintiff and putting the vendee into possession without an ejectment. But when the nature of an ejectment is considered, it will be found to give a decisive answer to this objection : it supposes that the lessor of the plaintiff enters and makes a lease, and that the defendant enters and evicts

the lessee. But if the defendant does not choose to enter, the lessor of the plaintiff cannot compel him; and then the lessor gains possession without an ejectment. Now here the assignee of the sheriff had a right of entry by the assignment made to him, and the plaintiff submitted to be turned out of possession quietly: then it cannot be necessary that the assignee should suppose an entry by the defendant, which has not been made. Wherever a person has right of entry, he may gain possession peaceably without being subject to an action for it; though indeed if he enforce that right by *violence*, he may be indicted for a forcible entry; and such was the case cited from *Shower*. The very contending that in this case the sheriff's assignee should have brought an ejectment admits an entry; and having entered, he had a right to hold afterwards under that entry; and it is stated in the plea that he did enter *peaceably* under the bill of sale. Neither can the defendant be considered as a trespasser *ab initio* on account of the expulsion in the first count: for at the trial only one expulsion was proved, which was justified; for the defendant may apply the justification to either count.

Wood in reply.—Although it may not be necessary to allege precisely *what interest* the plaintiff had, yet the defendant ought to have shown such an interest as would justify the expulsion. The case cited from *Shower* is applicable: if the sheriff can justify the expulsion in a civil action *& fortiori* he would be protected in a criminal prosecution. That case shows that the vendee should have brought an ejectment. For suppose an execution issues against a lessee for years, that term may be sold under the *feri facias*; but if it be underleased, the tenant cannot be expelled; and even if the undertenant be only a tenant at will, still he would be entitled to notice: otherwise the assignee of a sheriff under a *feri facias* would have greater privileges than any other landlord.

Lord *Kenyon*, Ch. J.—The first question which has been made, is whether it appears on the last plea that the plaintiff had such an interest as enabled the sheriff to

sell it under the *feri facias*; now upon that I have not the least doubt. It states that the *plaintiff was possessed of a certain interest in the residue of a term of years, &c.* The sheriff, who had not the title-deeds, could not exactly define what the precise interest was; but he states that the plaintiff was in possession of a *certain term*; and it is impossible to suggest any possession of a certain term that is not the subject-matter of a seizure by the sheriff under a *feri facias*. In this case I may even admit that the sheriff had no right to deliver possession to the assignee under the *feri facias*; under an *elegit* he certainly could not deliver the land extended: but this plea does not state that the sheriff put the assignee into possession, but only that he assigned to *Harris, who afterwards entered, and peaceably and quietly expelled the plaintiff*. It is true that persons having only a right are not to assert that right by force; if any violence be used it becomes the subject of a criminal prosecution; and that is the amount of the case cited from *Shower*, which was a proceeding under the statute for a forcible entry. But this is not a criminal prosecution; and the question is whether a person, having a right of possession, may not peaceably assert it, if he do not transgress the laws of his country. I think he may; for a person who has a right of entry may enter peaceably, and being in possession may retain it, and plead that it is his soil and freehold. And this will not break in upon any rule of law respecting the mode of obtaining the possession of lands.

Ashurst, J.—The case cited by the defendant's counsel is a decisive answer to the first objection with respect to the supposed defect in stating the plaintiff's interest: and it shows that it is more prudent in the sheriff to state it *generally*; because, if he attempt to state it *particularly*, and mis-state it, his justification fails. Then the only question is, whether it appears by the pleadings that the sheriff has done more than he was justified in doing: I think that by law he had a right to do that which it is stated he has done. For, the plaintiff having such an interest as was the object of the execution, the sheriff

entered and sold it to *Harris*, who entered and peaceably expelled the plaintiff. Therefore the sheriff has done nothing but what he was strictly authorised in doing ; and *Harris* only has been guilty of the expulsion. But even supposing that the defendant were answerable for the act of *Harris*, I think he might justify it ; for no person, who has a right of entry into lands, can be considered as a trespasser for asserting that right, unless it be attended with such acts of violence as will subject him to a criminal prosecution. The common plea of *liberum tenementum* proves it.

Buller, J.—From what has been agreed on both sides on what passed at the trial, nothing can be clearer than what is the justice and law of this case. And notwithstanding the form in which the verdict was taken, it is plain that it cannot remain as it is at present : for it is taken *generally* ; and it is admitted that only one act of trespass was proved. I am not satisfied that the jury could have found a verdict for any expulsion at all ; for if *Harris* had acted illegally, that could not affect the sheriff, who, when he had sold the term, was *functus officio*. And even supposing the expulsion to have been by the sheriff, yet, there being but one act of expulsion proved, the plaintiff could not be entitled to a verdict on both counts, because each imports to be a different trespass ; and the plea of not guilty goes to the whole declaration. Therefore the verdict should have been thus, guilty of breaking and entering, &c., in the manner stated in the first count ; and not guilty as to the second. The case on this record would then stand thus : there are two counts, and only one act of trespass was proved ; the first special plea justifies one trespass ; and if two had been committed, the defendant might have applied that justification to which he pleased : but here only one trespass was proved, which the defendant has justified, as the trespass mentioned in the first count. To that plea there is a demurrer : then consider whether that plea covers the whole count ; I am of opinion it does. The first count is for breaking, entering, and expelling ; the plea only justifies

7 T. B. 727.

the breaking and entering, showing a good cause for it : and that is a full answer to the first count ; for the *breaking and entering are the gist of the action*, and the *expulsion is only matter of aggravation*. If the plaintiff had wished to take advantage of the expulsion, he should have shown the special matter in a new assignment ; * for according to the *Six Carpenters' Case*, he should show in reply that which makes the party a trespasser *ab initio*. There is a case in *Ventris (a)*, where, to an action for a voluntary escape, the defendant pleaded that he took the prisoner on fresh pursuit, without traversing the voluntary escape ; and on demurrer it was adjudged sufficient ; for the Court said, " it was out of time to set it forth in the declaration : it should have come in the replication. It is (as Twisden, Justice, said) like leaping before you come to the stile." The same principle is also laid down in *Wilson (b)*, and in a case of *Fisherwood v. Cannon*, Hil. 5 Geo 3, C. B., where the defendant in trespass for taking and carrying away the plaintiff's halter and converting the same to his own use, pleaded the general issue, and justified under a prescriptive right to distrain for toll, which was found for the defendant ; but on the general issue the plaintiff had a verdict. A motion was afterwards made to enter up judgment for the plaintiff, notwithstanding the defendant had proved his justification, because it did not cover the whole trespass, namely, the conversion. But the Court held, that as the defendant's plea had fully answered the *gist* of the action, which was the *taking*, the *conversion* thereof being only *aggravation*, it became necessary for the plaintiff to reply that the defendant afterwards converted, &c., and thereby became a trespasser *ab initio*. So here the defendant having justified the breaking and entering, which are the *gist* of the action, if the plaintiff had intended to take advantage of the expulsion, which was merely matter of aggravation, he ought to have new assigned it. If then the first count be fully answered by the first plea, and that be good in point of law, there must be judgment for the defendant. As to the objection that the plea does not state what interest

* Quære as to the correctness of the course of pleading here suggested. See the note, *post*.

(a) Sir R. Borey's Case, 1 *Ventris*. 211, 217.

(b) 3 *Wils.* 20.

the plaintiff had, what has been observed by my Lord is decisive, namely, that it is stated that the plaintiff was in possession of a certain interest in a term, &c. The case cited shews that in a deed of assignment the sheriff need not specify the particular interest which the party had ; then if he can convey a title in general words, it is equally sufficient to justify in the same general words in an action of trespass. With regard to the first plea, I think it is bad on this ground : it begins with justifying the expulsion, and yet does not admit it. And it is a rule in pleading that the party justifying must shew and admit the fact ; but here the last plea does not admit that the defendant ever expelled the plaintiff at all. The plea states that the defendant entered and sold to *Harris*, who afterwards entered and quietly expelled, which does not affect the sheriff. On the other point, namely, in what cases the sheriff would be justified in expelling the party under a *fiery facias*, I give no opinion : but it seems to me that, where there is a tenant in possession and the execution is against the landlord, whose term is to be sold, the tenant cannot be turned out of possession : but that is very different from the present case, where the debtor himself is in possession. In such case I incline to think that the sheriff may turn him out of possession. However, I give no opinion of that at present, because it is not necessary to the decision of this case.

Grose, J.—I agree that the breaking and entering were the gist of the action, and that the expulsion was only matter of aggravation ; and that, if the plaintiff had wished to take advantage of it, he should have shewn it in a new assignment.

A verdict was then entered of Guilty on the first count, and Not Guilty on the second ; and judgment for the defendant on the demurrer to the first special plea ; and for the plaintiff on the second ; so that eventually the plaintiff took nothing by his writ.

THE above case, as reported in 3 T. R. 292, [was] substituted [in the fourth edition of this work] for that of *Crogate*, 8 Rep. 66, which appeared in former editions, but which has been rendered useless by the amendments of the law contained in the Common Law Procedure Amendment Act, 1852. It was not thought necessary to introduce the report of the affirmance of *Taylor v. Cole*, in the Exchequer Chamber, reported 1 H. Bl. 555. Much of the matter in this note, formerly appended to *Crogate's Case*, may still advantageously be read in connection with the principal case of *Taylor v. Cole*, and will, it is believed, be found equally applicable to the general replication now in use, as to the [now obsolete] replication *de injuriâ*. See *Glover v. Dixon*, 9 Exch. 178. It has been questioned whether this is so in all cases of New Assignment; but the forms of New Assignment in the schedule to the Common Law Procedure Amendment Act, 1852, seem to include the case of excess as well as that of entire mistake of the cause of action. [See also the 87th section of the act, and *Moore v. Webb*, 1 C. B. N. S. 673.] It may possibly be thought that since the above statute has come into force, an authority upon the subject of pleading scarcely merits a place amongst leading cases; and undoubtedly the relaxation of the extreme strictness of criticism formerly applied to the statements upon the record at certain stages of an action, and the great facility for correcting mistakes afforded by the 222nd section, have reduced the art of pleading to a place of less importance than it formerly occupied in legal studies. It must, however, be remembered that the accurate statement of such of the facts and circumstances of each case as are necessary to enable the plaintiff on the one hand to establish his entire cause of action, and the defendant on the other to set up his entire defence, is still an essential part of the duty of counsel; and that although a final defeat of justice, upon merely formal grounds, may be averted by the provisions already referred to, no legislative enactment can in all cases prevent the expense and delay which result from the necessity for amending untrue or imperfect narratives of the facts relied upon by the respective parties. Such inconveniences are to be avoided by taking care in the first instance to make the pleadings true and perspicuous, adopting the known and understood formulas used for the sake of brevity in cases of frequent occurrence, and where there is no such formula stating the material facts as they can be proved to exist in intelligible language. The reasons for retaining the substantial part of the system of pleading will be found at large in the Report of the Common Law Commissioners, published in 1851. Those reasons

consist principally in the necessity for ascertaining as speedily and distinctly as may be the relevant questions of law and fact in dispute between the parties, and of excluding from consideration all questions either irrelevant or not disputed, so as to diminish the expense of evidence, and enable the court to decide upon the matters really in dispute and none other. It has been thought right, therefore, to retain so much of the note appended to *Crogate's Case* in former editions, as is still useful, substituting, however, the case of *Taylor v. Cole* for the now useless one of *Crogate*, and adding a short statement respecting the alteration of the law.

The replication *de injuriâ* was a general replication putting in issue all the material averments in the plea, and it was in many cases open to objections in point of form, which, if successful, were fatal to the action, or caused the expense and delay of an amendment. The 51st section of the Common Law Procedure Amendment Act, 1852, however, has done away with all objections only available upon special demurrer, and consequently rendered obsolete amongst others a very numerous class of decisions, as to when a general replication putting in issue all the averments in a plea, was or was not objectionable in point of form. The 79th sect. of the same act virtually permits the use of such a replication in all cases, at

least where the issue to be raised involves matter fit to be tried by a jury, for it enacts that either party may plead in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect :

“The plaintiff *joins* issue upon the defendant's 1st (&c., *specifying what or what part*) plea.”

“The defendant *joins* issue upon the plaintiff's replication to the 1st (&c., *specifying what*) plea.”

And such form of joinder shall be deemed to be a denial of the substance of the plea, or other subsequent pleading, and an issue thereon ; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant. Also, in the schedule of forms annexed to the statute, and referred to in the 91st section, the following form of joinder of issue is given, viz. :—

“The plaintiff *takes* issue upon the defendant's first, second, &c. pleas.”

This difference between the forms given in the body of the act and the schedule, has been the occasion of an ingenious suggestion (*Chitty's Forms*, 10th edit. 117, in notâ), that “it may be more correct to use the term *joins* when the plea is a traverse, and the term *takes* when the plea is in confession and avoidance ;” and this

suggestion has, to a considerable extent, been followed in practice. It is believed, however, that no such distinction existed in the minds of the framers of the act, and that the difference between the wording of the body of the act and the schedule was accidental. That in the schedule seems to be the more accurate.

The replication *de injuriâ* [has become utterly obsolete]: As to the evidence under the general form of taking issue, given by the Common Law Procedure Act, 1852, it puts in issue *the whole of the defence contained in the plea*. *Philips v. Howgate*, 5 B. & A. 220; *Barnes v. Hunt*, 11 East, 451; *Lucas v. Nockells*, 10 Bing. 157; that is to say, all the averments in the plea necessary to constitute a good defence and not expressly admitted, as in *Renno v. Bennett*, 3 Q. B. 768, where there was a replication *de injuriâ absque residuo causæ*, admitting part of the plea; but not immaterial averments. *Shearm v. Burnard*, 10 A. & E. 593; *Davis v. Chapman*, 2 M. & G. 921; 3 Sc. N. R. 238; except where all the averments are equally immaterial, by reason of the plea being substantially insufficient even supposing all the facts averred therein were found for the defendant; in which case it should seem that all the facts must be proved strictly as averred. Also, it seems that in general, before the above statute, in order to sustain the issue raised

by the replication *de injuriâ*, the defendant was bound to prove so much of his plea as furnished a defence to the whole of the cause of action pleaded to; in a word, that the issue was not divisible. *Wilson v. Lewis*, 2 M. & G. 197; 2 Sc. N. R. 115. It is now, however, necessary in such cases to consider the effect of the 75th section of the act, which enacts, that "pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff, in respect of so much of the causes of action as shall not be so answered." [Apparently, under this section, if issue be joined on a plea, and the defendant proves so much of the plea as he might have pleaded to part of the count, as to so much he will be entitled to a verdict. See the judgment in *Reynolds v. Harris*, 3 C. B. N. S. 287, and further as to the construction of this section, see the observations of Jervis, C. J., in *Wilkinson v. Kirby*, 15 C. B. 444, 445; of Parke, B., in *Parr v. Jewell*, 16 C. B. 703; *Blagrove v. Bristol Waterworks Co.*, 1 H. & N. 369; *Chappell v. Davidson*, 18 C. B. 194; *Traherne*

v. *Gardner*, 8 E. & B. 161; and *Paterson v. Harris*, 2 B. & S. 814; S. C. 31 L. J. 277, where in an action on a policy of insurance on an electric telegraph cable, the declaration alleging the loss generally and the plea denying the loss of the cable "or any part thereof," it having appeared at the trial that only part of the cable was lost by the perils insured against, the verdict on the issue joined on the plea was entered generally for the plaintiff; but afterwards a rule was made absolute to enter it for the defendant, except as to the claim for the part lost by the perils insured against.]

If the plea state some authority in law, which would *prima facie* be a justification of the act complained of, the plaintiff will not it should seem be allowed under the statutory joinder of issue [for he was not allowed under *de injuriâ*] to show an abuse of that authority such as would, according to the doctrine laid down in the *Six Carpenters' Case*, convert the defendant into a tort-feasor *ab initio*. *Lambert v. Hodson*, 1 Bing. 317; *Price v. Peek*, 1 Bing. N. C. 387. See *Okes v. Wood*, 3 M. & W. 150; *Woods v. Durrant*, 16 M. & W. 149; *Glover v. Dixon*, 9 Exch. 178. The reason of which is, that the defendant comes to prove the truth of the justification stated in his plea, and would be taken by surprise, were the plaintiff allowed to make a new case at

Nisi Prius by a species of confession and avoidance of it. And in analogy of this, it was held in *Okes v. Wood*, 2 M. & W. 792, that the defendant's *motive* in committing an assault which he had justified in order to remove a riotous person, could not be inquired into under *de injuriâ*, notwithstanding *Lucas v. Nockells*, 10 Bing. 157.

But if the defendant necessarily state *in his plea* some fact on the existence or non-existence of which the question whether he be a trespasser *ab initio* or not depends, there it will be sufficient [as the plaintiff might have replied *de injuriâ*] to take issue in the statutory form; as where in trespass for breaking, entering, assaulting, and imprisoning, the defendants justified the assault and imprisonment under a *ca. sa.*, "*the outer door being open*," the plaintiff was allowed under *de injuriâ* to show that it was shut, so as to render them trespassers *ab initio*. *Kerbey v. Denbey*, 1 M. & W. 336. See, as to this case, the note to *Semayne's Case*, *ante*, 100.

There is a point of very frequent occurrence, to which, though perhaps not immediately connected with the main subject of this note, I will here advert, inasmuch as it mostly arises in cases in which *de injuriâ* [was] adopted as a replication. It often happens, that a defendant pleads *not guilty* to the whole of a declaration, and then, singling out certain parts of it which he thinks he is able

to justify, pleads, as to those, a special plea stating his justification. In answering such plea, it is necessary for the plaintiff to consider whether the special plea cover the whole of the substantial injury complained of in the declaration, omitting only matter of aggravation; for then, if he rely upon the excess, he ought to reply, or new assign it, according to whether it shows the defendant to be a trespasser *ab initio* or not, instead of merely joining issue on *not guilty*, and replying *de injuriâ* to the special plea, or taking issue thereon. For it has been held, that in such a case, if the defendant prove his special plea, the plaintiff will not be at liberty to give the excess in evidence under the issue joined on the plea of *not guilty*. In *Monprivatt v. Smith*, 2 Camp. 175, to trespass for breaking and entering a house, *staying therein three weeks*, and carrying away goods, the defendants pleaded, 1st. Not guilty; 2nd. As to breaking and entering, and staying *twenty-four hours parcel of the three weeks*, and also as to carrying away the goods, a justification under a *feri facias*. Replication to the last plea, admitting the writ, *de injuriâ sua propriâ absque residuo caruæ*. The defendants proved the justification, but it appeared that they stayed in the house more than twenty-four hours. Garrow and Wigley, for the plaintiff, submitted that the excess stood merely on the

plea of not guilty, and that the plaintiff was entitled to a verdict in respect of it. But Lord Ellenborough ruled that if the plaintiff intended to rely on that excess, he should have done so by a new assignment. See *Okes v. Wood*, 3 M. & W. 150; *Atkinson v. Warne*, 5 Tyrwh. 481; *Penn v. Ward*, 5 Tyrwh. 980.

In a learned note to this case [of *Monprivatt v. Smith*] the reporter cites *Taylor v. Cole*; *Dye v. Leatherdale*, 3 Wils. 20; *Fisherwood v. Cannon*, 3 T. R. 297; *Gates v. Bayley*, 2 Wilson, 313; and deduces from them as a general principle, that "where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment, that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning." But if there be several trespasses alleged in one and the same count in the declaration, and the defendant plead *not guilty* to some, and specially to others, and at the trial prove his special plea; still, if the plaintiff prove the several distinct acts of trespass stated in the declaration, he must have a verdict for as much as is not covered by the special plea. *Stammers v. Yearsley*, 10 Bing.

37; *Bush v. Parker*, 1 Bing. N. C. 72; *Phillips v. Howgate*, 5 B. & A. 220. The difficulty in these cases is in deciding whether the matter excluded from the plea of justification forms a distinct wrong, or is only an aggravation of what the special plea professes to justify. In *Bush v. Parker*, the action was in trespass for assaulting the plaintiff, seizing, pulling, and dragging him, forcing him into a pond, and there imprisoning him. *Pleas*: 1. *Not guilty*; 2. As to the assaulting and seizing, and a little pulling and dragging the plaintiff, a justification in defence of possession. The jury having found the defendants guilty on the first issue, and a verdict for them on the second, it was moved to enter judgment for them on the whole record, but the Court of Common Pleas refused: "I agree," said Tindal, C. J., "in the rule of law, that where, in trespass, the defendant pleads a justification going to the gist of the action, it is not necessary to include that which is mere matter of aggravation; and this brings us to the application of the rule, and to the inquiry whether it will serve the defendants or not, and we have only to look at the pleadings here, and to apply our common sense to the allegation, that the defendants dragged the plaintiff through the pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the

plaintiff first complains." So in *Noden v. Johnson*, 16 Q. B. 218, where the declaration complained that the defendant assaulted, beat, and ill-treated the plaintiff, and then *knocked him down* on the deck of a ship, and the defendant pleaded a justification as to the assaulting, beating, and ill-treating; it was held that the *knocking down* as alleged was a substantive trespass for which the plaintiff might recover. Lord Loughborough in *Taylor v. Cole*, as reported in the Exchequer Chamber, 1 H. Bl. 555, uses some language cited by the Chief Justice in *Bush v. Parker*, which may prove useful in distinguishing between statements of aggravation and statements of several trespasses, such as that in the latter case. The declaration was [as we have seen] for breaking and entering the plaintiff's house, and expelling him, and the plea justified the breaking and entering only.—"Undoubtedly," said his lordship, "to enter into a house and to expel the possessor, may be distinct acts, and they may be also connected. But where the plaintiff charges them as parts of one trespass, as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new assignment, state, that he insists upon the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to

consider it only as matter of aggravation." There is a class of cases decided upon st. 22 & 23 Car. 2, c. 9, (repealed as to costs by the 3 & 4 Vict. c. 24) certainly with no view to the present question, but which yet, upon examination, seem to have some bearing on it. Their effect is thus stated by Mr. Tidd, in his *Practice*, 9th edition, 964 : "Where an injury is done to a personal chattel, it is not within the statute ; or where an injury to a personal chattel is laid in the same declaration with an assault and battery, or local trespass ; and consequently, in these cases, though the damages be under forty shillings, the plaintiff is entitled to full costs without a certificate. *But then it must be a substantive independent injury ; for where it is laid or proved merely in aggravation of damage, as a mode or qualification of the assault and battery or local trespass, or there is a verdict for the defendant upon that part of the declaration which charges him with injury to a personal chattel, it is within the statute.* So where a *laceravit*, or tearing the plaintiff's clothes, is laid in the declaration, or found by the jury to be merely consequential to, or committed at the same time as, an assault and battery, the plaintiff recovering less than forty shillings damages, is not entitled to full costs without a certificate ; and in a late case it was held by the Court of Common Pleas, that if the plaintiff declare,

in one count, for assaulting him and beating his horse, on which he was riding, whereby it was injured, and the jury give a verdict with general damages under forty shillings, the plaintiff shall have no more costs than damages." In the cases thus collected by Mr. Tidd, it will be observed that the question, as in *Monprivatt v. Smith*, *Taylor v. Cole*, and *Bush v. Parker*, was, whether a particular injury, stated in the declaration, was part of the gist of the action, or merely in aggravation. And the decisions in those cases may therefore be found not altogether inapplicable in controversies arising on the point which we have just been discussing.

In the principal case of *Taylor v. Cole*, it was as we have seen said by Buller, J., that if the plaintiff had wished to take advantage of the expulsion, he should have shown the special matter in a *new assignment* ; and Lord Loughborough, in delivering the judgment of the Exchequer Chamber, said that it might be by replication or new assignment. It may be doubted, however, whether this is correct, and whether a statement of expulsion simply can ever be treated as more than mere matter of aggravation, so that the statement of an expulsion alone in the new assignment should seem to be insufficient, and it was so considered in the case of *Meriton v. Coombes* [9 C. B. 787]. If the circumstances of the expulsion be

such as to make the defendant a trespasser *ab initio*, it should seem that those circumstances ought to be replied, (not new assigned), as in *Price v. Woodhouse*, 1 Exch. 559, where the taking of the other horse made all that was done wrongful. Mr. Justice Buller was not in the above passage advertg to the particular manner in which the facts relied upon were to be brought before the court. [Where the defendant pleads *son assault de mesne*, in the new form given by the Common Law Procedure Act, 1852 (Sched. B.), the plaintiff may prove excess without replying it specially, *Dean v. Taylor*, 11 Exch. 68. As to amendment at the trial, or on a rule for new trial, by adding a new assignment, see *The Eastern Counties Railway Co. v. Dorling*, 5 C. B. N. S. 832.]

In *Pritchard v. Long*, 9 M. & W. 666, Baron Parke expressed an opinion that the *taking* of goods laid in a count for trespass to the realty is a substantive injury. [The *conversion* of goods alleged in a like count has been considered to be only matter of aggravation, *Pratt v. Pratt*, 2 Exch. 413.]

In *Woods v. Durrant*, 16 M. & W. 149, the question was raised "whether the assuming to answer matter of aggravation which need not have been averred, and answering it imperfectly, so that the plea, though perfect as to the material averments in the declaration, is not complete in omnibus, makes it bad in substance?" The

point was not decided. It seems that the imperfect answer ought, in such a case, to be rejected as surplusage, there being as yet no allegation of the plaintiff upon the record calling upon the defendant for any answer to such matter. For [though] the plaintiff may recover in respect of a cause of action imperfectly alleged in the declaration, if the imperfection be cured or supplied by the plea, if there be but one, *Brooke v. Brooke*, 1 Sid. 184; or by each of the plea if there be several, *Galloway v. Jackson*, 3 Man. & Gr. 960; [yet he can] not in respect of a cause of action disclosed by the plea only, and not alleged as a cause of action in the declaration, *Marsh v. Bulteel*, 5 B. & A. 507. [In *Reindel v. Schell*, 4 C. B. N. S. 97, upon demurrer to a plea to an immaterial averment of damage, judgment was given for the plaintiff, because of the insufficiency of the plea, and not for the defendant, because of the insufficiency of the allegation to which it was pleaded.]

The second point mentioned in the head note is one of general importance, and has given rise to a difference of opinion in the Court of Common Pleas, *Newton v. Harland*, 1 Man. & Gr. 644, though it is believed that the almost universal opinion of the profession has been in accordance with the doctrine of the principal case, and the opinion of the very learned judge, Mr. Justice Coltman, who

dissented from the majority of the court in *Newton v. Harland*. See further upon this subject [*Turner v. Mezmott*, 1 Bing. 158; *Wilbor v. Rainforth*, 8 B. & C. 4; and] *Perry v. Fitzhove*, 8 Q. B. 757, where a commoner, without notice or request to remove, pulled down an inhabited house, on the ground that it interfered with his common, and was held not to be justified; [acted on in *Jones v. Jones*, 1 H. & C. 1; S. C., 31 L. J., Exch. 506]; *Davies v. Williams*, 16 Q. B. 546, where the same course, after notice and request to remove the house, was held to be justifiable; *Davison v. Wilson*, 11 Q. B. 890, where a declaration, stating that the defendant, with force and arms, and with a strong hand and against the form of the statute, &c., broke and entered the plaintiff's dwelling-house, in his actual occupation, &c., and in a forcible manner, and with a strong hand, broke open the doors, broke the locks, &c., was held to be well answered by a plea that the dwelling-house was the dwelling-house, soil, and freehold of the defendant; *Burling v. Read*, 11 Q. B. 904, where the defendant justified pulling down his workshop in the actual occupation of the plaintiff; *Harvey v. Brydges*, 14 M. & W. 437, affirmed in error, 1 Exch. 261; [and *Delaney v. Fox*, 1 C. B. N. S. 166. See also *Blades v. Higgs*, 10 C. B. N. S. 713; S. C., 30 L. J. C. P. 347, where *Harvey v. Brydges* was treated as an overruling authority, and the principle of it was applied to the retaking of chattels. And see, as to recaption, *Patrick v. Colerick*, 3 M. & W. 483].

See 6 Mod. 70,
216.
Fitzgib. 86,
185.

THE SIX CARPENTERS' CASE.

MICH.—3 JACOBI 1.

[REPORTED 8 COKE, 146a.]

If a man abuse an authority given him by the law, he becomes a trespasser ab initio.—Contrà of an authority given by the party.—The abuse is good matter of replication.—Mere nonfeasance does not amount to such abuse as makes a man a trespasser ab initio.

IN trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac., in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c., and upon the (a) new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house, *præd' tempore quo, &c., et diu antea et postea*, was a common wine tavern of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *præd' tempore quo, &c., viz. hora quartâ post meridiem*, into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess that the said house

(a) 2 Co. 5. a.
18. b.

(b) Kelw. 38. a. was a common (b) tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants,

did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same : upon which the defendants did demur in law : and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment, upon request, is a denying in law), makes the entry into the tavern tortious. And first, *it was resolved when entry, authority, or (a) licence is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio ; but where an entry, authority, or licence is given by the (b) party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio.* And the reason of this difference is, that in the case of a general authority or licence (c) of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered, for *acta exteriora indicant interiora secreta*. *Vide* 11 H. 4. 75. b. But when the party gives an authority or licence himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence, and therefore the law gives authority to enter into a common inn or tavern : so to the lord to distrain ; to the owner of the ground to distrain damage-feasant ; to him in reversion to see if waste be done ; to the commoner to enter upon the land to see his cattle ; and such like. *Vide* 12 E. 4. 8. b. 21 E. 4. 19. b. 5 H. 7. 11 a. 9 H. 6. 29. b. 11 H. 4. 75. b. 3 H. 7. 15. b. 28 H. 6. 5. b. But if he who enters into the inn or tavern doth a trespass, as if he (d) carries away anything ; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the (e) distress ; or if he who enters to see waste break the house, or (f) stays there all night ; or if the commoner cuts down a tree ; in these and the like cases, the law adjudges that he entered for that purpose ; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if (g) a purveyor takes my cattle by force of a commission, for the king's house.

(a) 2 Roll. 561.
Yelv. 96, 97.

(b) 5 H. 7. 11. a.
Perk. sect. 191.
Yelv. 96, 97.
21 E. 4. 19. b.

(c) 2 Roll. 561.
21 E. 4. 19. b.
76. b. per
Catesby.
Yelv. 96, 97.
Perk. sect. 191.
5 H. 7. 11. a.

(d) Perk. sect.
119. 2 E. 4. 5.
Cro. Car. 196.
Yelv. 96.

(e) 12 E. 4. 8. b.
9 Co. 11. a.
1 And. 65.
Cro. Jac. 148.
Perk. sect. 191.

(f) 2 Roll. 561.
11 H. 4. 75. b.
Fitz. Tresp. 176.
Br. Tresp. 97.
Br. Replica. 12.

(g) 2 Roll. 561.
13 H. 6. 9 b.
2 Inst. 546.

it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6. 19. b. *Et sic de similibus.*

(a) Cr. Car. 196.
2 Bulstr. 312.
1 Roll. Rep. 130.

2. *It was resolved per totam curiam, that (a) not doing cannot make the party, who has authority or licence by the law, a trespasser ab initio, because not doing is no trespass, and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser ab initio; and therewith agrees 33 H. 6. 47. a. So if a man takes cattle damage-feasant, and the other offer sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover (b) damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69. g. temp. E. 1. Replevin, 27. 27 E. 3, 88. 45 E. 3. 9. So in the case at*

(b) Lit. Rep. 34.
Dr. & Stud. lib.
2. 112. b.
Hethl. 16. |

(c) 1 Roll. Rep.
60. 2 Bulstr.
312.

bar, for not (c) paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point (d) 12 E. 4. 9. b.

(d) 1 Sid. 5.
12 E. 4. 9. a. b.

For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put is not (e) law, for it is no trespass, but the taverner shall have an action of debt: and there before (f) Brown held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such

(e) 12 E. 4.
9. b.

(f) 12 E. 4.
9. b.

(g) 1 Sid. 5.

a case shall have (g) a special action of debt; *scil.* that A. did put cloth to him to make a gown thereof for the said A., and that A. would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt: in that

case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor over-values the making, or the necessities to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making, and the necessities thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so specially agreed. But in such case he may (a) detain the garment until he is paid, as the hostler may the horse. *Vide* Br. Distress, 70, and all this was resolved by the court. *Vide* the Book in 30 Ass. pl. 38, John Matrever's case, it is held by the court, that if the lord or his bailiff comes to distrain, and (b) before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant,* if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3. 8. b. in the Mr. of St. Mark's case, and so is the opinion of Hull to be understood in 13 H. 4. (c) 17 b., which opinion is not well abridged in the title Trespass, 180. *Note reader this difference, that tender upon the (d) land before the (e) distress makes the distress tortious; tender after the distress and before the impounding, makes the detainer, and not the taking, wrongful (†); tender after (g) the im-*

(d) 2 Sid. 40.

(e) 5 Co. 76 a. 2 Inst. 107.

(†) [The remedy for the detention is not confined to replevin, *Loring v. Warburton*, E. B. & E. 507; but see *Glynn v. Thomas*, 11 Exch. 870.]

(g) 2 Roll. 561. 1 Brownl. 173. 2 Inst. 107. 5 Co. 76 a. It seems to have been thought in the case of *Smith v. Goodwin*, 4 B. & Ad. 415, that this doctrine does not apply to the case of a distress for rent, but that a tender of the rent and charges after impounding would make the subsequent detainer tortious. In that case, however, there was a seizure, an impounding upon the premises, then a tender of the rent and charges, then a relinquishment of the distress, and then a second seizure. See *Vertue v. Beasley*, 1 M. & Rob. 21, Parke, B. In *Thomas v. Harries*, 1 M. & Gr. 695, 1 Sc. N. R. 524, Maule, J., thought that under 11 Geo. II. c. 19, s. 22, the right of tender remained as long as the distress was on the premises; but the other judges differed from him. The doctrine laid down in the *Six Carpenters' Case* is affirmed by *Ellis v. Taylor*, 8 M. & W. 415; and *Ladd v. Thomas*, 4 P. & D. 9; 12 A. & E. 117, S. C.; *West v. Nibbs*, 4 C. B. 172. [But the Court of Queen's Bench has since held quite consistently with the *Six Carpenters' Case*, and in accordance with the prevailing opinion, though dissenting from *Thomas v. Harries*, *Ellis v. Taylor*, and *Ladd v. Thomas*, that by the equity of the statute of Wm. and Mary a tender of the rent and expenses after impounding, but within five days of the taking, renders a subsequent detention unlawful. *Johnson v. Upham*, 2 E. & E., 250; S. C. 28 Law J. Q. B. 252. A tender of rent without expenses after a warrant of distress has been delivered to the broker, but before its execution, is good. *Bennett v. Bayes*, 5 H. & N. 391.

(a) Hob. 42. Yelv. 67. Cro. Car. 271, 272. Br. Distress, 71. Palm. 223. Hut. 101. 22 E. 4. 49b. Moor 877. 5 Ed. 4. 2. b. 1 Roll. Rep. 44. 2 Roll. Rep. 439. 2 Roll. 85, 923. 3 Bulstr. 269. (b) Br. Distr. 37. Br. Tender, &c. 18. [Bennett v. Bayes, 5 H. & N. 391; S. C. 29 L. J. Exch. 224.] (*) [Singleton v. Williamson, 7 H. & N. 747; S. C. 31 L. J. Exch. 237.] (c) 2 Roll. 561. See *Anscombe v. Shore*, 1 Camp. 385. 1 Taunt. 261. Replevin for taking and impounding, *plea a tender after the taking and before impounding*: held good, for the detainer after tender is a new taking. *Evans v. Elliott*, 5 A. & E. 142. [Tennant v. Field, 8 E. & B. 337.]

*pounding makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined.** But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *Detinue* for the detainer after: or he may, upon satisfaction made in court, have a writ for the redelivery of his goods; and therewith agree the said books in 13 H. 4 17. b. 14 H. 4. 4. *Registr' Judic'* 37. 45 E. 3. 9. and all the books before. *Vide* 14 Ed. 4. 4. b.; 2 H. 6. 12; 22 Hen. 6. 56; Doctor and Student, lib. 2, cap. 27; Br. Distress 72. and Pilkington's Case, in the Fifth Part of my Reports, fol. 76, and so all the books which *prima facie* seem to disagree, are upon full and pregnant reason well reconciled and agreed.

* [*Singleton v. Williams*, 7 H. & R. 747.]

FROM this case, which is one of the most celebrated in Lord Coke's Reports, three points are to be collected:

1. That if a man abuse an authority given to him by the law, he becomes a trespasser *ab initio*.

2. That in an action of trespass, if the authority be pleaded, the subsequent abuse may be replied.

3. That a mere *nonfeasance* does not amount to such an abuse as renders a man a trespasser *ab initio*.

The first of these points has been frequently confirmed. In *Oxley v. Watts*, 1 T. R. 12, the plaintiff sued the defendant in trespass for taking a horse; the defendant justified taking him as an estray. Replication, that, after the taking mentioned in the de-

claration, the defendant worked the horse, and so became a trespasser *ab initio*. On motion in arrest of judgment, the court held the replication good, and the defendant a trespasser *ab initio*. The same point, precisely, was decided in *Bagshaw v. Goward*, B. N. P. 81; Cro. Jac. 147, where it arose on demurrer; *accord. Gargrave v. Smith*, Salk. 221; Sir *Ralph Bovey's Case*, 1 Vent. 217; *Aitkenhead v. Blades*, 5 Taunt. 198. One consequence of this doctrine was, that, if a party, entering lawfully to make a distress, committed any subsequent abuse, he became a trespasser *ab initio*. In *Gargrave v. Smith*, Salk. 221, and *Dye v. Leatherdale*, 3 Wilson, 20, this was expressly decided. But, if there be a seizure

of several chattels, some of which are by law seizable, and some not, or some of which are subsequently abused, and the rest not, the seizure is or becomes illegal, only as to the part which it was unlawful to seize, or which was subsequently abused, and the seizure of the rest continues legal; *Dod v. Monger*, 6 Mod. 215; *Harvey v. Pocock*, 11 M. & W. 740. As it was found, however, that this doctrine of trespass *ab initio* bore extremely hard on landlords; to relieve them, stat. 11 G. 2, c. 19, s. 19, provided, that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*; but the party grieved may recover satisfaction for the damage [and no more] in a special action of *trespass or on the case*, at the election of the plaintiff, and, if he recover, he shall have full costs. The true construction of the above words, "*trespass, or on the case*," is, that the party injured must bring trespass if the injury be a trespass, and case, if it be the subject-matter of an action on the case. The nature of the irregularity determines the form of action. Hence, case ought to be brought for an irregularity in omitting to appraise the goods before selling them, and trespass for remaining in possession beyond the five days.

Winterbourne v. Morgan, 11 East, 395; see *Etherton v. Popplewell*, 9 East, 139. Note the diversity between such cases and *Miles v. Bough*, 3 Q. B. 845, where a statute gave an option to sue by action of debt, or on the case. By 17 G. 2, c. 38, s. 8, where any distress shall be made for money justly due for the relief of the poor, the party distraining shall not be deemed a trespasser *ab initio*, on account of any act subsequently done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass or on the case, with full costs, unless tender of amends is made before action brought. [There are like provisions in the General Highway Act, 5 & 6 Will. 4, c. 50, s. 104; and the Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 131. To support an action for irregularity, actual damage must be proved, *Rodgers v. Parker*, 18 C. B. 112; *Lucas v. Tarleton*, 3 H. & N. 116.]

As to the right of a plaintiff to *reply* the abuse, where it is such as renders the defendant, who has pleaded the authority which he has abused, a trespasser *ab initio*: that is established by several cases. In the principal case it seems to have been assumed: for no objection was taken to the replication as being a departure: but Lord Coke says, that the only point was, whether the denying to pay made the first entry into the tavern tortious. In *Gargrave v. Smith*,

Salk. 221, B. N. P. 81, trespass for taking goods. *Plea*, that defendant distrained them damage-feasant. *Replication*, that he afterwards converted them to his own use. "On demurrer, it was holden to be no departure, but to make good the declaration: for he that abuses a distress is a trespasser *ab initio*; and it would be of no avail to the plaintiff to state the conversion in his declaration, for it is no ways necessary to his action, and, if alleged, need not be answered. It would be out of time to state it in the declaration, but it must come in in the replication." Acc. *Roberts v. Taylor*, 3 Dowl. & L. 1. See too Sir *R. Bovey's Case*, 1 Vent. 217, where Hale, C. J., said, that to state it in the declaration would be "like leaping before you came to the stile;" and see *Taylor v. Cole*, [*ante*, p. 115]. And the only proper course is to reply specially; for if the defendant plead an authority in law, and the plaintiff rely on an abuse, he must not [take issue], as will be seen in the note to *Taylor v. Cole*, *ante*, p. 126, and *Price v. Peek*, 1 Bing. N. C. 380.

It has been held that the sheriff, if indeed he be a trespasser at all, is not at all events so *ab initio*, on account of his detaining a prisoner who came into his custody lawfully

beyond the time at which, according to the practice of the court as regulated by statute (but of the applicability of which to the plaintiff's case it was not averred the sheriff had notice), he ought to have been detained. In that case a distinction was drawn by Little-dale, J., between cases in which the excess *may* have been contemplated at the time of the original act, and those in which it could not possibly have been so. *Smith v. Egginton*, 7 A. & E. 161. See *Magnay v. Burt*, 5 Q. B. 381; [*Ash v. Dawson*, 8 Exch. 237].

As to becoming a trespasser, *ab initio* by *nonfeasance*, see the dicta in *Jacobson v. Blake*, 6 Man. & Gr. 925, 7 Scott, N. R. 772. In *West v. Nibbs*, 4 C. B. 172, it was held that a landlord who accepted the rent in arrear, and expenses, after impounding a distress, and then retained possession of the goods distrained, was only guilty of a *nonfeasance*, and therefore not a trespasser *ab initio*, though he might be liable for a conversion of the goods to his own use; and *Evans v. Elliot*, 5 Ad. & E. 142, was distinguished on the ground that it was an action of replevin, as was also *Vertue v. Beasley*, 1 M. & Rob. 21, Parke, B., on the ground that in that case there was a removal of the goods after the tender.

LAMPLEIGH v. BRATHWAIT.

MICH. 13 JACOBI.—ROT. 712.

[REPORTED HOBART, 105.]

A mere voluntary courtesy will not uphold an assumpsit; but a courtesy moved by a previous request will.—Labour, though unsuccessful, is a good consideration.—Of assumpsit and considerations generally.*

* [See next page, note †.]

ANTHONY LAMPLEIGH brought an assumpsit against Thomas Brathwait and declared, that whereas the defendant had feloniously slain one Patrick Mahune; the defendant, after the said felony done, instantly required the plaintiff to labour, and do his endeavour to obtain his pardon from the king, whereupon, the plaintiff, upon the same request, did, by all the means, he could and many days' labour, do his endeavour to obtain the king's pardon for the said felony, viz. in riding and journeying at his own charges from London to Roston, when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterwards, *sc. &c.*, in consideration of the premises, the said defendant did promise the said plaintiff to give him 100*l.*, and that he had not, &c., to his damage 120*l.*

In a case in *Espinasse*, this consideration was held illegal, viz. *Norman v. Cole*, 3 Esp. 253, [cited in the judgment of Pollock, C. B., in *Egerton v. Brownlow*, 4 H. of Lords' Cases, 148].

To this the defendant pleaded non assumpsit, and found for the plaintiff, damage 100*l.* It was said in arrest of judgment, that the consideration was passed.

But the chief objection was, that it doth not appear that he did anything towards the obtaining of the pardon, but riding up and down, and nothing done when he came there. And of this opinion was my brother (Warburton),

but myself and the other two judges were of opinion for the plaintiff,* and so he had judgment.

First, it was agreed, that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. Pasch. 10 Eliz., Dyer, 272. *Hunt and Bates*. See *Oneley's Case*, 19 Eliz., Dyer, 355.†

Then, as to the main point, it is first clear, that in this case upon the issue non assumpsit, all these points were to be proved by the plaintiff:

1. That the defendant had committed the felony, *prout*, &c.

2. Then that he requested the plaintiff's endeavour, *prout*, &c.

3. That thereupon the plaintiff made his proof, *prout*, &c.

4. That thereupon the defendant made his promise, *prout*, &c.

For wheresoever I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of commission for this purpose.

So then the issue found *ut supra* is a proof that he did his endeavour according to the request, for else the issue could not have been found: for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise.‡ And if it were not indeed then acted, it is *nudum pactum*.

But if it be executory, as, in consideration that you shall serve me a year, I will give you ten pound, here you cannot bring your action, till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not

* See 1 *Wms. Saund.* 211 c. in *notis*, 2 *Wms. Saund.* 136, in *notis*.

† [In *Kennedy v. Brown*, 13 C. B. N. S. pp. 740, 741; S. C. 32 L. J. C. P. 148, the Court thought the application of this principle should not be extended, saying that "probably at the present day such service, on request," as was performed in the leading case, "would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence to the jury to fix the amount."]

Difference between a consideration past and to come.

‡ See *R. H.* 1834 [*Reg. Gen.* H. T. 1853, r. 6], *Passenger v. Brookes*, 1 *Bing. N. C.* 587 [S. C. 7 C. & P. 110; 1 *Scott*, 560, explained in *Bennion v. Davison*, 3 *M. & W.* 197].

the performance, that makes the consideration ; † yet it is a promise before, though not binding, and in the action you shall lay the promise as it was, and make special averment of the service done after.

† See Notes to *Portage v. Cole*, 1 Wms. Saund. 320, and to *Peeters v. Opie*, 2 Wms. Saund. 352 [and to *Cutter v. Powell*, post, vol. 2, p. 9].

Now if the service were not done, and yet the promise made, *prout*, &c., the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

Then also note here, that it was neither required, nor promised to obtain the pardon, but *to do his endeavour* to obtain it : the one was his end and the other his office.

Now then, he hath laid expressly, in general, that he *did his endeavour* to obtain it : viz. *in equitando*, &c., to obtain. Now then, clearly, the substance of this plea is general, for that answers directly the request, the special assigned is but to inform the court ; and therefore, clearly, if, upon the trial, he could have proved no riding nor journeying, yet any other effectual endeavour according to the request would have served : † and therefore, if the consideration had been, that he should endeavour in the future, so that he must have laid his endeavour expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavour, he must have traversed the endeavour in the general, not in the riding, &c., in the special ; which proves clearly, that is not the substance, and that the other endeavour would serve. This makes it clear, that though particulars ought to be set forth to the court, and those sufficient, which were not done, which might be cause of demurrer ; yet being but matter of form, and the substance in the general, which is herein the issue and verdict, it were cured by the verdict ; but the special is also well enough ; for all is laid down for the obtaining of the pardon which is within the request ; and therefore, suppose he had ridden to that purpose, and Brathwait had died, or himself, before he could do anything else, or that another had obtained the pardon before, or the like, yet the promise had holden.

† See the Notes to *Bristow v. Wright*, post.

And observe that case, 22 E. 4, 40. Condition of an

obligation, to show a sufficient discharge of an annuity, you must plead the certainty of the discharge to the court.† The reason whereof, given by Brian and Choke, is, that the plea there contains two parts, one a trial *per pais*, *scil.* the writing of the discharge, the other by the court, *scil.* the sufficiency and validity of it, which the jury could not try, for they agree, that if the condition had been to build a house agreeable to the state of the obligee, because it was a case all proper for the country to try, it might have been pleaded generally: and then it was a demurrer, not an issue, as is here.

† So to a plea of *nul agard* in an action on a bond to perform an award, the replication must [before the 15 & 16 Vict. c. 76 have] set out the award in order that the court [might] judge of its sufficiency. See 1 Wms. Saunders, 327, *n.d.*

WHENEVER the consideration of a promise is *executory*, there must *ex necessitate rei* have been a request on the part of the person promising. For if A. promise to remunerate B., in consideration that B. will perform something specified, that amounts to a request to B. to perform the act for which he is to be remunerated. See *King v. Sears*, 2 C. M. & R. 53; 5 Tyrwh. 587; [and *Shadwell v. Shadwell* (9 C. B. N. S. 159; 30 L. J. C. P. 145, S. C.), where a man's promise to pay his nephew an annuity in consideration of the latter marrying a lady to whom he was already engaged, was held to be binding]. The only difficulty that can arise in such cases is on the question which sometimes occurs *whether the consideration move from the plaintiff*: as, for instance, if A., in consideration of something to be done by B., were to promise something to C., in this case, C. being a stranger to the consideration, unless he in some way had intervened in the agreement between A. and B., could not sustain an action on the promise. See *Price v. Easton*, 4 B. & Ad. 433; *Osborne v. Rogers*, 1 Wms. Saund. 264; *Thomas v. Shillibeer*, 1 M. & W. 126; [*Tveddle v. Atkinson*, 1 B. & S. 393]. But if the plaintiff *have* intervened in the agreement, that is sufficient. *Tipper v. Bicknell*, 3 Bing. N. C. 710; *Webb v. Rhodes*, *ib.* 734. And in *Lilly v. Hayes*, 5 A. & E. 549, A. transmitted money to B. and afterwards informed him that it was for C.: B. having assented to this, and C. having, by B.'s authority, been informed of it, it was held that B. had in effect made himself C.'s banker as to the 100*l.*, and that C. might maintain *assumpsit* for money had and received against B. See also *Dutchman v. Tooth*, 5 Bing. N. C. 577; [and *Noble v. The National Discount Company*, 5 H. & N. 225; S. C. 29 L. J. Exch. 210].

The case of *Lilly v. Hayes* should carefully be compared with and distinguished from that class of cases, constituting a long series from *Williams v. Everett*, 14 East, 582, to *Orr v. Union Bank of Scotland*, 1 MacQueen, 513, in which it has been held that the mere payment of money by A. to B. for C. is revocable, and confers no right of action upon C. Perhaps the distinction is between a case in which the receiver of the money has undertaken to hold it as the agent of the person for whom it is destined, and where no such undertaking has been given. [It should be noticed that the decision in *Lilly v. Hayes*, (the correctness of which has been recently doubted) does not apply to cases raising the question whether a debtor has become liable to a third party in lieu of the original creditor, see *Liversidge v. Broadbent*, 4 H. & N. 603 : S. C. 28 Law J. Exch. 332 ; *Moore v. Bushell*, 27 Law J. Exch. 3.]

Where the consideration is executed, unless there have been an antecedent request, no action is maintainable upon the promise ; for a request must be laid in the declaration, and proved, if put in issue at the trial. *Child v. Morley*, 8 T. R. 610 ; see *Sutton v. Tatham*, 10 A. & E. 27 ; *Stokes v. Lewis*, 1 T. R. 20 ; *Naish v. Tatlock*, 2 H. Bl. 319 ; *Hayes v. Warren*, 2 Str. 933 ; *Richardson v. Hall*, 1 B. & B. 50 ; *Durnford v. Messiter*, 5 M. & S. 446. See

Reg. Gen. Hil. 1832, pl. 6 [Reg. Gen. Hil. 1853, pl. 6]. For although courts of law will not, in the absence of fraud, enter into the question of *adequacy* of consideration, [*Haigh v. Brooks*, 10 A. & E. 309 ; *Kearns v. Durell*, 6 C. B. 596 ; *Hart v. Miles*, 4 C. B. N. S. 371] ; *Skeate v. Beale*, 11 A. & E. 983 ; *Englund v. Davison*, 11 A. & E. 856, yet a mere voluntary courtesy is not sufficient to support a subsequent promise ; but when there was previous request, the courtesy was not merely voluntary, nor is the promise *nudum pactum*, but couples itself with, and relates back to, the previous request, and the merits of the party which were procured by that request, and is therefore on a good consideration. See *Parvle v. Gunn*, 4 Bing. N. C. 448 ; [*Bradford v. Roulston*, 8 Irish Cha. R. 468]. When, however, it is above said that the request must be *laid* and *proved*, it must be understood that there are some cases in which the consideration, though *executed*, is of such a nature that it must have been moved by a previous request, and in which, therefore, as in a case of executory consideration, the statement that what was done was *at the defendant's request*, is merely *expressio eorum quæ tacite insunt*, and, therefore, unnecessary. Such, for instance, is the case of money lent, which, if lent at all, must obviously have been so with the borrower's concurrence. [See the

form of a count for money lent given in the schedule (B) annexed to the Common Law Procedure Act, 1852.] But the demand for money paid to the defendant's use stands on a different footing, for it may be so paid without his request, which, consequently, ought to be averred in terms, and proved, either directly or by circumstances from which it may be implied by law. *Victor v. Davies*, 12 M. & W. 758; 1 M. & Gr. 265, *note*. Such a request may be either *express* or *implied*. If it have not been made in express terms, it will be implied under the following circumstances:—

First, Where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable. *Jeffreys v. Gurr*, 2 B. & Ad. 833; *Pownall v. Ferrand*, 6 B. & C. 439; *Exall v. Partridge*, 8 T. R. 308; *Toussaint v. Martinnant*, 2 T. R. 100; *Grissel v. Robinson*, 3 Bing. N. C. 13; [*Connell v. McGorlich*, 12 Irish C. L. 161; and *Bradshaw v. Beard*, 12 C. B. N. S. 344].

Secondly, Where the defendant has *adopted* and enjoyed the benefit of the consideration, for in that case the maxim applies *omnis ratihabitio retrotrahitur et mandato æquiparatur*. Vide *Parvle v. Gunn*, 4 Bing. N. C. 448; [*Barber v. Brown*, 1 C. B. N. S. 121].

Thirdly, Where the plaintiff *voluntarily* does that whereunto

the defendant was legally compellable, *and* the defendant afterwards, in consideration thereof, *expressly* promises. *Wennall v. Adney*, 3 B. & P. 250, *in notis*; *Wing v. Mill*, 1 B. & A. 104; Selw. N. P. 8th ed. p. 57, *n.* 11; *Paynter v. Williams*, 1 C. & M. 818. But it must be observed that there is this distinction between this and the two former cases, *viz.*, that in each of the two former cases the law will imply the *promise* as well as the *request*, whereas in this and the following case the *promise* is not implied, and the *request* is only then implied when there has been an express promise. *Atkins v. Banwell*, 2 East, 505.

Fourthly, In certain cases, where the plaintiff *voluntarily* does that to which the defendant is *morally*, though not *legally*, compellable, and the defendant afterwards, in consideration thereof, *expressly* promises. See *Lee v. Muggeridge*, 5 Taunt. 36; *Watson v. Turner*, B. N. P. 129, 147, 281; *Trueman v. Fenton*, Cowp. 544; *Atkins v. Banwell*, 2 East, 505. But every *moral* obligation is not perhaps sufficient for this purpose. See per Lord Tenterden, C. J., in *Litfield v. Shee*, 2 B. & Ad. 811. Indeed it seems to be now clearly settled by the elaborate judgment of the Court of Queen's Bench in *Eastwood v. Kenyon*, 11 A. & E. 452, 3 P. & D. 276, S. C., that a mere moral obligation, however sacred, is not a sufficient founda-

tion for a binding promise, and that the class of considerations derived from moral obligation includes only those cases in which there has been a legal right which is become devoid of legal remedy. Such, for instance, is the case of a promise made by a debtor whose liability has been barred by the Statute of Limitations. See note to *Whitcombe v. Whiting*, *post*, and *Latouche v. Latouche*, 3 H. & C. 576. And see what is said as to infancy, *Williams v. Moor*, 11 M. & W. 263. Another instance, before the statute 12 & 13 Vict. c. 106, (the Bankrupt Law Consolidation Act, 1849,) was the case of a bankrupt discharged from debts by his certificate, but whose moral obligation, though devoid of legal sanction, was considered capable of sustaining a new express promise to pay a debt so discharged, and such a promise might have been made either before or after certificate; see *Trueman v. Fenton* Cowp. 544; *Kirkpatrick v. Tattersall*, 13 M. & W. 766. The 204th section of the above statute has the effect of annulling the legal efficacy of such promises of the bankrupt, and has left them upon the footing of honorary obligations only. [As another instance, may be added *Flight v. Reed*, 1 H. & C. 703; S. C. 32 L. J. Exch. 265, where bills of exchange given after the repeal of the usury laws in renewal of bills accepted as a security for a loan while those laws were in force, and void under them,

were held enforceable; *sed quære*.] The tendency of modern decisions has been to confine the legal efficacy of moral obligation to the cases above mentioned. Thus, where a man seduced a woman, and, after cohabitation had ceased, by way of compensation, expressly promised to pay a yearly sum for her support, that promise was held not to be binding in law: *Beaumont v. Reeve*, 8 Q. B. 483. [See also *Hulse v. Hulse*, 17 C. B. 711.]

Whether a father impliedly undertakes to repay any person supporting his child whom he deserts? *Dubitatur*, *Urmston v. Newcomen*, 4 A. & E. 899. It seems that no such undertaking would be implied by law. Parke, B., in *Seaborne v. Maddy*, 9 Car. & P. 497, said, "No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper; and it requires a contract to enable another person to do so, and charge him for it in an action." The same law was laid down in *Mortimore v. Wright*, 6 M. & W. 482, where, per Lord Abinger, "in point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle, or a mere stranger would be;" and Parke, B., said, "It is a clear principle of law, that a father is not under

any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose any legal liability." [The mother of an illegitimate child is bound by statute (4 & 5 Will. IV. c. 76. s. 71) to maintain it while she is unmarried or a widow; but after her death, without having made a will in its favour, there is no legal liability to support it out of her estate, *Ruttinger v. Temple*, 4 B. & S. 491; S. C. 33 L. J. Q. B. 1.] The future maintenance of a child would, however, of course be a sufficient consideration for a promise, *Jennings v. Brown*, 9 M. & W. 496; [and *Smith v. Roche*, 6 C. B. N. S. 223, where the father of bastard children was held liable on a promise to their mother to pay her an annuity, in consideration of her undertaking to take charge of them and to supply them with necessaries.] And such a promise need not be in express terms, but may be implied from circumstances, *Blackburn v. Mackey*, 1 C. & P. 1; *Law v. Wilkin*, 6 A. & E. 718; 1 N. & P. 697; though, according to the case of *Mortimore v. Wright*, *supra*, "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove

such a contract against any other person, and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case according to their own feelings or prejudices," per Lord Abinger.

A remarkable exception from the rule, that a promise to pay may be implied from a previous request, occurs in the case of a barrister, who can claim no remuneration for services performed at the request of the client, the circumstance of his profession rebutting the implication of a promise, which would otherwise have arisen. ["The relation of counsel and client in litigation, creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant, and the services of the plaintiff," a barrister suing for compensation for professional services to the defendant, "created neither an obligation, nor an inception of an obligation, nor any inchoate right whatever, capable of being completed and made into a contract by any subsequent promise." These are the words of Chief Justice Erle, delivering a memorable judgment in *Brown v. Kennedy*, 13 C. B. N. S. 677; S. C. 31 L. J. C. P. 137. Another exception from the same rule is to be found in the case of physicians; according to usage, their fee is an *honorarium*; still, being under no incapacity such as that of the barrister, they might make

valid express contracts, rendering their clients legally liable to pay them for their services. See *Veitch v. Russell*, 3 Q. B. 928 ; the judgment of Wood, V. C., in the *A.-G. v. The Royal College of Physicians*, 1 Johns. & Hem. 561 ; and *Brown v. Kennedy*, *ubi supra*. Now, by the Medical Act (21 & 22 Vict. c. 90, s. 31) physicians, if duly registered (*Turner v. Reynall*, 14 C. B. N. S. 328), are entitled to recover reasonable remuneration for their services, unless a by-law to the contrary be made by the college to which they belong. See *Gibbon v. Budd*, 2 H. & C., 92 ; S. C. 32 L. J. Exch. 182, where the usual fees were recovered. In a note to the report of that case, it appears that the Royal College of Physicians has passed a by-law disentitling its fellows to sue for professional aid rendered.] Another exception may be where there is a covenant under seal, which would rebut the inference of an implied promise, and not sustain an express one to do what is covenanted, for want of new consideration, *Baber v. Harris*, 9 A. & E. 532 ; *Middleditch v. Ellis*, 2 Exch. 623 ; [*Matthew Blackmore*, 1 H. & N. 762.]

Upon the question, what will amount to evidence of a request where it is necessary to prove one, see *Alexander v. Vane*, 1 M. & W. 513. Where A. and B. went to C.'s shop ; A. ordered goods, and B. said in A.'s presence that he would pay for them if A. did

not. This was held evidence of a request from A. to B. to pay for them in case of his own default. [A principal is bound to indemnify his agent against the natural consequences of all acts done by him in pursuance of the authority conferred upon him ; and if in obedience to any custom or usage of the business, or any rule of the market in which his principal has deputed him to act, or otherwise in the regular course of his employment, he pays money on behalf of his principal, a request to make the payment will be implied, *Sutton v. Tatham*, 10 A. & E. 27 ; *Taylor v. Stray*, 2 C. B. N. S. 175 ; *Smith v. Lindo*, 5 C. B. N. S. 587 ; *Rosewarne v. Billing*, 15 C. B. N. S. 316 ; 33 L. J. C. P. 55.]

One of the most singular, perhaps the most singular case determined on the ground of *nudum pactum*, is *Hopkins v. Logan*, 5 M. & W. 247, where it was held that an account stated, and a sum thereupon found to be due to the plaintiff, will not support a promise to pay such sum *in futuro*, though the law would imply a promise to pay it *in presenti*. The ground of the decision appears to have been, that the promise implied by law to pay *in presenti* exhausted as it were the consideration, and that there was, consequently, no consideration left for any other promise ; so that it bears some analogy to *Granger v. Collins*, 6 M. & W. 458 ; in which a declaration that B. had agreed to take

A.'s house at a certain rent; and that A., in consideration of the premises, promised that he should enjoy without eviction from C., was held bad for want of a consideration to support the *assumpsit*; and see *Brown v. Crump*, 1 Marsh. 567; *Jackson v. Cobbin*, 8 M. & W. 790; *Roscorla v. Thomas*, 3 Q. B. 234; 2 Gale & D. 508; *Kaye v. Dutton*, 8 Scott, N. R. 495; and [*Elderton v. Emmens*, 4 H. of Lords Cases, 624.] In *Hopkins v. Logan*, as has been just observed, a debt payable *in præsentî* was held no consideration for a promise to pay *in futuro*; but in *Walker v. Roston*, 9 M. & W. 411, the Court of Exchequer held that a debt payable *in futuro* was a good consideration for an appropriation of funds in the hands of the debtor's agent by way of security for the debt. The distinction seems to be between an *executed* transfer and an *executory* promise. In *Kaye v. Dutton*, 2 D. & L. 296-7; 8 Scott, N. R. 502-3, Tindal, C. J., after citing *Hopkins v. Logan*, and other cases of that class, points out the possibility of a distinction between them and cases of executed consideration from which *no* promise can be implied by law, intimating that possibly, although considerations of the former class are only capable of supporting the promise implied by law, yet those of the latter may be capable of supporting any promise otherwise unobjectionable. No decision, however,

was pronounced upon that point. And it seems impossible to state any rational distinction between the latter class of cases and moral obligations of pure gratitude for favours past, which, as we have seen (*ante*, p. 144) will not sustain a promise. The question was again much discussed, but not decided, in *Elderton v. Emmens*, *supra*; [and see *Lattimore v. Garrard*, 1 Exch. 809.]

It is perhaps upon the principle that a gift while executory is *nudum pactum*, and therefore incapable of being enforced, that a parol gift of chattels is held to pass no property to the donee without delivery, *Irons v. Smallpiece*, 2 B. & A. 558. Even where the intended donee is in possession at the time of the gift, *Shower v. Pilck*, 4 Exch. 478. [The payee of a promissory note made and given to him in the expectation of his performing services, but without any contract binding him to serve, cannot maintain an action upon it, *Hulse v. Hulse*, 17 C. B. 711.] The property may be passed by a contract of sale for valuable consideration without delivery, *Dixon v. Yates*, 5 B. & Ad. 340, per Parke, J.; but whether it does pass or not must depend upon the intention of the parties, and it was held, in a modern case in the Court of Exchequer [which seems not to have been reported], that the property in a specified chattel, bought in a shop, to be paid for upon being sent home, did not pass be-

fore delivery. [The property in a specific ascertained chattel passes by the contract of sale unless the contrary appears to have been the intention of the parties, as where by the contract something remains to be done to the chattel by the seller, *Gilmour v. Supple*, 11 Moore, P. C. C. 551; see also *The Calcutta Co. v. Demattos*, 32 L. J. Q. B. 322; *Wood v. Bell*, 6 E. & B. 355; the judgment of Erle, C. J., in *Chambers v. Miller*, 10 C. B. N. S. 125; *Turley v. Bates*, 2 H. & C. 200; S. C. 33 L. J. Exch. 43; *Godts v. Rose*, 17 C. B. 229; and *Joyce v. Swan*, 17 C. B. N. S. 84.]

It has been above stated that one of the cases in which an *express request* is unnecessary, and in which a promise will be *implied*, is that in which the plaintiff has been compelled to do that to which the defendant was *legally* compellable. On this principle depends the right of a surety who has been damnified to recover an indemnity from his principal. *Toussaint v. Martinnant*, 2 T. R. 100; *Fisher v. Fellows*, 5 Esp. 171; [*Emery v. Clark*, 2 C. B. N. S. 582.] Thus, the indorser of a bill who has been sued by the holder, and has paid part of the amount, being a surety for the acceptor, may recover it back as money paid to his use and at his request, *Pownall v. Ferrand*, 6 B. & C. 439. So may the acceptor, where under the circumstances, *e. g.*, by reason of a composition or the like, the bill ought not to

have been negotiated, or ought to have been taken up by some other person, *Hawley v. Beverley*, 6 Scott, N. R. 837; *Horton v. Riley*, 11 M. & W. 492; *Hooper v. Traffrey*, 1 Exch. 17. But then the surety must have been *compelled*, *i. e.*, he must have been under a reasonable obligation and necessity to pay what he seeks to recover from his principal; for if he *improperly* defend an action and incur costs, there will be no implied duty on the part of his principal to reimburse him those, unless the action was defended at the principal's request, *Roach v. Thompson*, 1 M. & M. 487. See 4 C. & P. 194; 11 A. & E. 31, n.; *Gillett v. Rippon*, 1 M. & M. 406; *Knight v. Hughes*, 1 M. & M. 247; *Smith v. Compton*, 3 B. & Ad. 407; *Short v. Kalloway*, 11 A. & E. 28, *ubi per* Lord Denman, "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action he cannot defend." See *Walker v. Hatton*, 10 M. & W. 249, *Tindall v. Bell*, 11 M. & W. 228; [and *Bonneberg v. Falkland Islands Co.*, 34 L. J. C. P. 34.] But if he make a reasonable and prudent compromise, he will be justified in doing so, *Smith v. Compton* [*ubi supra*]; *Dixon v. Fawcus*, 30 L. J. Q. B. 137]. And where the plaintiff's claim is of an unliquidated nature and needs investigation, it seems that he may, unless expressly forbidden,

incur the expense of investigating it or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so, *Blyth v. Smith*, 5 M. & Gr. 407; 6 Scott, N. R. 360. It seems to be for the jury in each case to say whether, in defending and incurring the costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case, and if the jury find that he did, the costs may be recovered, *Tindall v. Bell*, *supra*; [*Broom v. Hall*, 7 C. B. N. S. 503; *The Legatees*, 1 Swab. Adm. R. 168.] However, it is always advisable for the surety to let his principal know when he is threatened, and request directions from him; for the rule laid down by the King's Bench in *Smith v. Compton*, 3 B. & Ad. 407, is, that "the effect of want of notice (to the principal) is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if an opportunity had been given him The effect of notice to an indemnifying party is stated by Buller, J., in *Duffield v. Scott*, 3 T. R. 376, recognised in *Jones v. Williams*, 7 M. & W. 493. The purpose of giving notice is not in

order to give a ground of action; but if a demand be made which the party indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." It is very necessary in this place to observe the distinction between the case of a contract to indemnify, or a contract to do *the very thing to which the contractee is liable*, and the breach of which, consequently, may raise an obligation to indemnify the contractee against such liability, and a contract to do something not precisely the same with that to which the contractee is liable. In the latter case the Court of Exchequer has held, that the costs occasioned by an action against the contractee, on such liability, were not recoverable over, *Penley v. Watts*, 7 M. & W. 601; where a lessee, who had made an underlease containing covenants not precisely the same with those in the original lease, was held not to be entitled to recover from his underlessee the costs of an action brought against him by his own lessor for the breach of the covenants in the original lease, and some reflections were both in that case and in *Walker v. Hatton*, 10 M. & W. 249, which affirms it, cast upon

Neale v. Wylie, 3 B. & C. 533, which may be considered as finally overruled by *Logan v. Hall*, 4 C. B. 598, where it was holden that a lessee, who had been evicted for breach of covenant, could not recover the value of the lease from his sublessee, whose sublease did not contain any covenants the performance of which would necessarily have included a performance of the covenants in the original lease. See Sedgwick on Damages, 325.

On the same ground as the liability of a principal to reimburse his surety, *depends the right of one surety or joint contractor* who has been obliged to satisfy the whole demand to recover a proportionable contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand, parcel of which his fellow was compellable to satisfy, *Cowell v. Edwards*, 2 B. & P. 268; *Turner v. Davies*, 2 Esp. 478; *Browne v. Lee*, 6 B. & C. 697; *Deering v. Winchelsea*, 2 B. & P. 270; *Kemp v. Finden*, 12 M. & W. 421; [and *Reynolds v. Wheeler*, 10 C. B. N. S. 561; S. C. 30 L. J. C. P. 350;] though, indeed, if one have become surety at the instance of the other, particularly if that other have received from the principal a separate indemnity for himself, it will be different, *Turner v. Davies*; see *Thomas v. Cook*, 8 B. & C. 728. A surety's right to reimbursement from the principal accrues, *toties quoties*, as often as he is compelled

to make a payment; that to contribution from a surety does not accrue till it is ascertained that one surety has paid more than his just proportion of the debt, after which it accrues, *toties quoties*, on the occasion of each payment that he is subsequently forced to make, *Davies v. Humphreys*, 6 M. & W. 168. And he may recover contribution according to the number of sureties, without reference to the number of principals, *Kemp v. Finden*, 12 M. & W. 421. In equity the *solvent* sureties are liable to contribute *inter se* to the whole amount, *Peter v. Rich*, 1 Cha. R. 19; *Holt v. Harrison*, 1 Cha. Ca. 246; *Layer v. Nelson*, 1 Vern. 456; [whereas at law the proportion recoverable seems to be determined by the number of original sureties, see per Bayley, J., in *Browne v. Lee*, 6 B. & C. 697; *Batard v. Hawes*, 2 E. & B. 287.] See, as to the right of a joint contractor to contribution, Lord Kenyon's judgment in *Merryweather v. Nixan*, 8 T. R. 186, and *post*, vol. 2; *Abbott v. Smith*, 2 Bl. 947; *Hutton v. Eyre*, 6 Taunt. 289; *Bayne v. Stone*, 4 Esp. 13; *Burnell v. Minot*, 4 Moore, 340; *Holmes v. Williamson*, 6 M. & S. 158; [and *Batard v. Hawes*.] Where several have employed another to do work for their common benefit, there is an implied undertaking by all to contribute rateably *inter se*, *Edger v. Knapp*, 6 Scott, N. R. 707; [S. C., 5 M. & G. 755; *Spottiswoode's Case*, 6 De G. Mac. & G. 345.]

And where, by the nature of the case, the representative of any party dying is to have the same benefit as the deceased would have had, if he had lived, the law will imply the like promise on the part of the deceased, that his representative shall contribute, notwithstanding that he is under no direct liability in a court of law, to the common creditor, *Prior v. Hembrow*, 8 M. & W. 873 (*Nota*. The count was in the *indebitatus* form for money paid to the use of the executor, *ib.*); [and see the judgment in *Batard v. Hawes*, 2 E. & B. 296.] It is otherwise, indeed, where the joint contractors are partners, for then justice could not be done between them without balancing the partnership accounts, which is the office of a court of equity, *Sadler v. Nixon*, 5 B. & Ad. 936; unless the partnership was merely in an isolated transaction, *Wilson v. Cutting*, 10 Bing. 436; [or the transaction was separate from the partnership, *Sedgwick v. Daniell*, 2 H. & N. 319; and see *French v. Styring*, 2 C. B. N. S. 354; S. C. 26 L. J. C. P. 181.

Here may be mentioned the new remedy at law given to sureties in cases in which the creditor, whose demand has been satisfied, holds securities against the principal debtor or against the parties liable to contribute. By the 5th section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), it is provided that, "every person who, being surety for the

debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, upon a proper indemnity, to use the name of the creditor, in any action or other proceedings at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceedings by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable."

This enactment extends to the case of a co-defendant who pays the whole of the debt recovered against all the defendants jointly, and entitles him to an assignment of the judgment, *Batchellor v. Lawrence*, 9 C. B. N. S. 543 ; 30 L. J. C. P. 39. On a refusal to assign, the proceeding must not be by motion, *Phillips v. Dickson*, 8 C. B. N. S. 391.]

No action for contribution is maintainable by one wrongdoer against another, although the one who claims contribution may have been compelled to satisfy the whole damages arising from the *tort* committed by them both. This was decided in *Merryweather v. Nixan*, 8 T. R. 186. There, Starkey, having brought an action on the case against Merryweather and Nixan for an injury done by them to his reversion, levied the whole damages, amounting to 840*l.*, upon Merryweather, who thereupon sued Nixan for a contribution : the plaintiff was nonsuited on the ground that such an action lay not between wrongdoers ; and the court afterwards held the nonsuit proper. Lord Kenyon, in his judgment, having laid down the general principle, observed, that "the decision would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right." "From the inclination of the court, in *Phillips v. Biggs*, Hard. 164, from the concluding part of Lord

Kenyon's judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Per Best, C. J., in *Adamson v. Jervis*, 4 Bing. 72. Accordingly in *Betts v. Gibbons*, 2 A. & E. 57, such an action was held to be maintainable. There, the defendant consigned to the plaintiffs ten casks of acetate of lime, for Nyren and Wilson, two of which were delivered, but the remaining eight continued in the plaintiffs' hands up to the time of Nyren and Wilson's bankruptcy, on which the plaintiffs, by the defendant's orders, refused to deliver them to the assignees, who brought an action of trover, which the plaintiffs compromised by paying the value of the casks, together with the costs, and brought this action against the defendants for indemnity. They were held to be entitled to recover. "The principle laid down in *Merryweather v. Nixan*," said Taunton, J., "is too plain to be mistaken. *The law will not imply an indemnity between wrongdoers. But the case is altered where the matter is indifferent in itself, and when it turns upon circumstances whether the act be wrong or not.* The act done here by changing the destination of the goods at the order of the defendant, was not

clearly illegal; and, therefore, not within the rule in *Merryweather v. Nixan*: accord. *Humphreys v. Pratt*, 2 Dow. & Cl. 288; *Pearson v. Skelton*, 1 M. & W. 504; *Fletcher v. Harcot*, Hutt. 55; S. C. as *Battersey's Case*, Winch. 48. [In *Dixon v. Fawcus*, 30 L. J. Q. B. 137, the defendant gave the plaintiff an order to make a quantity of firebricks, and to impress them with a mark which the defendant knew, but the plaintiff did not know, to be the trade-mark of one Ramsay. The bricks were made, and marked according to the order, and thereupon Ramsay commenced a suit in Chancery for an injunction against the plaintiff, who, after incurring expenses about the defence to the suit, compromised the matter by paying Ramsay a certain amount, and then brought an action to recover that amount and the expenses so incurred, charging the defendant with fraud in having directed him to put the trade-mark on the bricks; on demurrer to the declaration, the action was held to be maintainable. In Chancery the plaintiff, notwithstanding his ignorance of the trade-mark, would, it appears, have been liable for the costs of Ramsay's suit. See *Burgess v. Hills*, 26 Beav. 244; *Burgess v. Hatley*, ib. 249. (See further as to trade-marks, *Leather Cloth Co. v. American Leather Cloth Co.*, Dom. Proc., 35 L. J., Cha. 53; and the 25 & 26 Vict. c. 88.) So, ignorance of piracy is no answer to an action for it, *Reade v. Con-*

quest, 11 C. B. N. S. 492, 493.] In *Colburn v. Patmore*, 4 Tyrwh. 677; 1 C. M. & R. 73, the proprietor of a newspaper sued his editor for falsely, maliciously, and negligently inserting a libel therein, without the knowledge, leave, or authority of the plaintiff, "in consequence of which the plaintiff was convicted and fined for falsely and maliciously printing and publishing the said libel." The case was determined against the plaintiff on a slip in the pleading, the court being of opinion, that it was consistent with the statement in the declaration, that the plaintiff, though he did not know of the original insertion of the libel, might afterwards have knowingly and wilfully permitted it to be printed, and so have been convicted in consequence of his own criminal act, and not of that of the defendant. But, during the argument, the question whether a newspaper proprietor, convicted and fined in consequence of the publication of a libel by his editor without his knowledge or consent, could maintain an action for indemnity, was elaborately discussed at the bar, and the court in delivering judgment expressed a strong opinion that he could not. "I am not aware," said Lord Lyndhurst, C. B., "of any case in which a man convicted of an act declared by law to be criminal, and punished for it accordingly, has been suffered to maintain an action against the party who par-

ticipated with him in the offence, in order to procure indemnity for the damages occasioned by that conviction; but after hearing the argument, I entertain little or no doubt that such an action could not be maintained." (See *Shackell v. Rosier*, 2 Bing. N. C. 634.)

Perhaps this case may be thought to involve considerable hardship. The proprietor of a newspaper is, for the security of the public, rendered the single exception to that otherwise universal rule of law, that a master *shall not be criminally responsible for the act of his servant, done without his knowledge or authority*. See *Rex v. Gutch*, M. & M. 433. His liability to the indictment is, as Lord Lyndhurst expressed it, "an anomaly." Admitting that it would also be an anomaly, that a man convicted of a crime should recover indemnity: still, if one anomaly be permitted in the law in order to convict him, may not another anomaly be introduced in order to indemnify him? It is hard to consider the case anomalous as against the proprietor, and refuse to treat it as such in his favour. If there be one case only in which a man, morally innocent, may be convicted of a crime, should there not be a corresponding exception to the rule which debars persons so convicted from indemnity. It has been said that his liability to the indictment proceeds upon the ground that the law *presumes* him to be cog-

nisant of the libel. *In presumptione juris consistit æquitas*. But what equity is there in continuing such a presumption after its object, namely, the protection of the public, has been satisfied? And that, too, when the effect of doing so is to exempt the person morally guilty from punishment, at the expense of the person morally innocent, for the defendant in the action for indemnity must always be one who has published the libel knowingly, wilfully, and without the knowledge or consent of the proprietor. In *Campbell v. Campbell*, 7 Cl. & Fin. 181, it appeared that the appellant and respondent and others were partners in a distillery, and that in the course of certain illegal transactions which took place in the management of the distillery by one of the partners, the whole firm, including the pursuer, though absent and ignorant of the delict, became liable to penalties. A prosecution was commenced, and the firm, including the pursuer, consented to a verdict against them for 3000*l.* penalties. The pursuer, after payment of the penalty, brought the action for an indemnity, which was opposed *inter alia* on the ground that he was *particeps criminis*, and therefore disentitled; and *Colburn v. Patmore*, *supra*, was cited. However, although no decision was pronounced upon the point, Lord Cottenham, C., seems to have thought it clear, that the pursuer,

though liable to the penalty, was not *particeps criminis* in the sense which would disentitle him to sue for contribution.

In *Hunter v. Hunt*, 1 C. B. 300, an unsuccessful attempt was made to extend the limits of the action for contribution. In that case, the plaintiff and defendant were underlessees by different leases and of distinct parcels of premises, held under one original lease at an entire rent, which being in arrear and paid by the plaintiff under a threat of distress, he brought his action against the defendant to recover a contribution proportionate to his interest, as for money paid to his use. The Court of Common Pleas, however, held the action not maintainable.

Under the same principle, *viz.* that a previous *request*, and a *promise* to indemnify, will be implied in favour of a plaintiff, who has been compelled to do that to which the defendant was legally compellable, may be ranked the cases in which a *tenant*, who has been forced to pay some demand to which the landlord was primarily liable, has been held entitled to deduct the amount from his rent, or to recover it again from the landlord, as money paid to his use. Such was *Taylor v. Zamira*, 6 Taunt. 524; that was an action of replevin, in which the defendant made cognisance as bailiff of Carpue for 8*l.* 15*s.*, being a quarter's rent, under a demise at 35*l.* per annum. The plaintiff

pleaded in bar, that, before that demise, Rideout and Tothill were seised each of an undivided fourth part of the premises, and severally demised the same for terms of 99 years to S. S. Still; who assigned them to Tucker; who, before the demise by Carpue, and before that person had any interest in the premises, granted an annuity of 102*l.* 16*s.* per annum, issuing out of the said two undivided fourth parts, to Mary Knowles, with power of distress; that afterwards, and before the time when, &c., a sum exceeding the arrears mentioned in the cognisance, *viz.* 205*l.* 12*s.*, fell due to M. Knowles, who demanded payment from the plaintiff, and threatened to distrain on him; whereupon, in order to prevent his goods from being distrained, the plaintiff paid 8*l.* 15*s.* (the rent mentioned in the cognisance) in part payment of the annuity. The plea was held good: Gibbs, C. J., remarking, that *Sapsford v. Fletcher*, 4 T. R. 511, was decisive that a tenant, threatened with distress for rent due to a superior landlord, might pay it, and deduct the payment from his own rent; that the only difference was, that there his immediate lessor was personally liable to that rent, and that here the land only was liable, but that *nothing could turn on that distinction*. And Burrough, J., said that, had the payment by the plaintiff exceeded the rent due from him, he might have brought *assumpsit* against

the defendant for the surplus. In *Sapsford v. Fletcher*, 4 T. R. 511, above referred to, a tenant, to an avowry for rent arrear, pleaded a payment under threat of distress, of ground-rent to the superior landlord. It was urged, 1st, that this amounted to a set-off, and was not pleadable in replevin; 2nd, that this was a payment by the tenant in his own wrong, for that no man can make another his debtor by voluntarily paying the debt of that other. But the court said, it was not a set-off, but a payment; and that the payment was not voluntary, but compulsory, for it was made under threat of distress, which the superior landlord had it in his power to levy. In *Johnson v. Jones*, 9 A. & E. 809, the same principle was applied to a payment of interest due upon a mortgage prior to the lease; though in *Boodle v. Cambell*, 8 Scott, N. R. 104; S. C. 7 M. & G. 386; a payment by a tenant of a proportional part of the rent to a person claiming part of the demised premises by title paramount to the landlord, and who demanded the rent after it fell due, so that there was nothing in the case that could be considered as an eviction, was held no answer to the landlord's action for rent, not being a payment of any *charge upon the land*, or of any *debt due from the landlord*. In *Baker v. Greenhill*, 3 Q. B. 148, it was holden, that where lands charged with the repair of a bridge were occupied by

a person not the owner, the occupier, although primarily responsible to the public for the repairs, was entitled to reimbursement from the owner. Nor is it necessary, for the purpose of rendering the payment one by compulsion, that the superior lord should actually threaten to distrain; for a demand by one who has power to distrain is equivalent to a threat of distress; and such a payment, to use the words of Best, C. J., is no more voluntary than a donation to a beggar who presents a pistol, *Carter v. Carter*, 5 Bing. 406. *Acc. Pitt v. Purssord*, 8 M. & W. 538.

It was stated, as has been already observed, by Burrough, J., in *Taylor v. Zamira*, that, if the payment made by the tenant to the head landlord had exceeded the sum due from him to the lessor, he might have sued his lessor in *assumpsit* for the surplus. This is a corollary from the general rule we are discussing, *viz.*, that if A. be *compelled* to pay the debt which B. is legally *compellable* to satisfy, A. may sue B. for the amount, and the law implies a previous request from B. to A. to pay the debt, and a subsequent promise to reimburse him. It seems unnecessary that there should even be a demand by the person to whom the money is paid, if there be in him a legal right, by the exercise of which the person who pays may be damnified, unless he satisfy it. *Broughton's Case*,

5 Rep. 24 *a*, seems to support that proposition, and with an excellent reason, from the year book of 18 E. 4, 27 *b*, namely, "that terror of suit, so that he dare not go about his business, is a damnification, although he be not arrested or forced by process," &c. See also *Pitt v. Purssord*, 8 M. & W. 538; *Gibbons v. Vouillon*, 8 C. B. 483. Indeed, in *Schlencker v. Moxey*, 3 B. & C. 789, where a lessee by deed, who had been distrained upon for ground-rent, declared against his lessor, on an implied promise to indemnify, it was held that the covenant for quiet enjoyment by the word demise excluded such an implication. And the word *grant* has been held to have a similar effect, and to exclude the tenant's right to sue for money paid, *Baber v. Harris*, 9 A. & E. 532; *quære* since 7 & 8 Vict. c. 76, s. 6, and 8 & 9 Vict. c. 106, s. 4. See *ante*, 147. In *Moore v. Pyrke*, 11 East, 53, the general principle was not disputed; but the action failed, because the plaintiff, instead of paying the rent to the superior landlord, had suffered his goods to be distrained and sold, so that, in fact, he never had paid any money to the defendant's (his lessor's) use; and, as the declaration was for money paid, he failed; a reason which seems not to have been approved of by the Court of Exchequer in the case of *Rogers v. Maw*, 15 M. & W. 444, where the goods of a joint contractor were taken under a *fieri*

facias. [In *Griffenhoof v. Daubuz*, Cam. Scacc., 5 E. & B. 746, the question was whether an action could be maintained to recover indemnity from the owner of land for the loss of a stack of wheat belonging to the plaintiff, and which, while lawfully upon the land, had been distrained upon and sold for arrears of a tithe commutation rent charged upon the land, but not upon the landowner personally. It was held that the action would not lie for want of privity between the plaintiff and the defendant.] But in *Exall v. Partridge and others*, 8 T. R. 308, the plaintiff, a stranger, placed his carriage on premises which the defendant [Partridge and the two other defendants] rented from Welch for a term of years; the other two had transferred their interest to their co-lessee; but there was a covenant by all three to pay rent, so that all continued liable to Welch, the head landlord. Welch having distrained the carriage for rent, the plaintiff paid the arrears, in order to release it, and was allowed to recover the amount from the defendants in an action of *assumpsit* for money paid. "One person," said Lawrence, J., in his judgment in that case, "cannot by a voluntary payment raise an *assumpsit* against another; but here was a distress for rent due from the three defendants; the notice of distress expressed the rent to be due from them all, the money was

paid by the plaintiff in satisfaction of a demand *on all*, and it was paid by compulsion; therefore, I am of opinion that this action may be maintained against the three defendants. The justice of the case, indeed, is that the one who must ultimately pay this money should alone be answerable here. But *as all the three defendants were liable to the landlord for the rent in the first instance*, and as, by this payment made by the plaintiff, all the three were released from the demand of rent, I think that this action may be supported against all of them."

The above words are printed in *italics* because there is a distinction between this case and the case where one person is compelled to make a payment to which another is liable, not, however, primarily, but only in consequence of a special agreement with the party who is forced to make it; the remedy in such case not being on any implied *assumpsit*, but on the special agreement itself: thus in *Spencer v. Parry* 3 A. & E. 331, the defendant took a house from the plaintiff, and agreed to pay certain taxes, which were by statute payable by the landlord. The plaintiff, having been compelled to pay these taxes in consequence of the defendant's default, brought an action of debt for money paid against him. It was objected that he ought to have sued upon the special agreement, and the court held the

objection fatal. "The plaintiff's payment," said the Lord Chief Justice, delivering judgment, "delivered the defendant *from no liability but what arose from the contract between them*, the tax remained due by his default, which would give a remedy on the agreement, *but it was paid to one who had no claim upon him, and therefore not to his use.*" *Accord. Lubbock v. Tribe*, 3 M. & W. 607, which was decided on the authority of *Spencer v. Parry*. In *Lubbock v. Tribe* the defendant gave a cheque for money due from him to the K. Co.; the plaintiffs received it as the company's agents; it was afterwards lost, and the plaintiffs agreed with the defendant that he should give them a new cheque on their giving him an indemnity. No new cheque was given: but the plaintiffs having been obliged to pay the amount to the company, brought an action against the defendant *for money paid*, which was held not to be sustainable. "On the special agreement," said Parke, B., "I think an action might be maintained, but not for money paid, because the payment of the money does not exonerate the defendant from any liability at all. It is not money paid to his use, it is money paid to the plaintiffs' own use, who are bound to make good the amount to the K. Company." But in a previous case, in which the compulsory payment was made in discharge of a party, who, though

not primarily liable, was *ultimately* so, not by any special agreement, but by the provisions of an Act of Parliament, it was decided, that the party compelled to make the payment might recover on an implied *assumpsit*. In *Dawson v. Linton*, 5 B. & A. 521, goods of the plaintiff, an outgoing tenant, left by him on his farm, were distrained for a tax payable by the tenant, but which the Act gave him power to deduct from his rent: the court decided, that, as the tax must ultimately fall on the landlord, and as the plaintiff had been compelled to pay it in order to ransom his goods, he had a right to recover the amount from the landlord, as money paid to his use. It may, perhaps, be thought, that the payment in this case is liable to the concluding observation of the court in *Spencer v. Parry*, that "*it was made to one who had no claim upon the defendant, and therefore not to his use.*" But though, in *Dawson v. Linton*, there was no claim for the tax against the defendant personally, there was a claim against the land which was his property; nay, there was one contingency, *viz.* that of there being no sufficient distress, in which the Act provided that the land itself might be seized *quousque* for the arrears due; and *Taylor v. Zamira* shows that a claim against a man's property is equivalent, for this purpose, to one against his person; but, in *Spencer v. Parry*, the defendant had

quitted the premises, so that neither he nor his property could have been molested on account of the tax, at the time when the plaintiff paid it. The doctrine laid down in *Spencer v. Parry* is obviously inapplicable to the case where a liability has been incurred at the request of the defendant, and in consequence of incurring such liability, the plaintiff has been put to expense; because, in such a case, the payment has in truth been made in consequence of the request of the defendant, and it is immaterial whether it has relieved the defendant from a liability or not, *Brittain v. Lloyd*, 14 M. & W. 762; [per Parke, B., in *Hutchinson v. Sydney*, 10 Exch. 438; *Risbourg v. Bruckner*, 3 C. B. N. S. 812.] See also *Hawley v. Beverley*, 6 M. & Gr. 221. It may be mentioned in connection with this subject that it has been held by the Court of Exchequer that a parol demise implies a contract for quiet enjoyment, but not for title, *Bandy v. Cartwright*, 8 Exch. 913; [*Acc. Hall v. City of London Brewery*, 2 B. & S., 737; 1 S. C. 31 L. J. Q. B. 257; and see *Penfold v. Abbott*, 32 L. J. Q. B. 67.] And it does not disentitle a tenant to be saved harmless from proceedings for rent payable by his landlord, that his own rent is in arrear, *Briant v. Pilcher*, 16 C. B. 354.

Here we must not omit to remark that there is a peculiarity in the right of the tenant to recoup

himself for moneys paid in the discharge of some burden upon the land prior to his own interest therein, which distinguishes that from all other cases of compulsory payment to the use of another. Such payments, when made by a tenant under compulsion, are considered as actual *payments* of so much of his rent, and may be pleaded by way of *payment*, as contra-distinguished from *set-off*; (see *Taylor v. Zamira* and *Sapsford v. Fletcher*, *supra*, and *Johnson v. Jones*, 9 A. & E. 809;) whereas, generally speaking, one who has been compelled to pay the demand to which another is liable, although he may recover the amount in *assumpsit*, or set it off in an action against himself, cannot appropriate it to the payment of a debt due by him to the person to whose use he paid it, without obtaining that person's consent. The fact is, that, in cases of landlord and tenant, the very relation in which the parties stand to each other creates an implied consent, upon the landlord's part, that the tenant shall appropriate such part of his rent as shall be necessary to indemnify him against prior charges, and that the money so appropriated shall be considered as paid on account of rent; but this implication is liable to be rebutted, for if the landlord were afterwards to repay the tenant the money paid by him in respect of the charge, he might recover the entire rent,

eo nomine, without any deduction. All this is well explained by Buller, J., in *Sapsford v. Fletcher*. "There is great difference," says his Lordship, "between a payment and a set-off; the former may be pleaded to an avowry, though the latter cannot. That is a good payment which is paid as part of the rent itself in respect of the land, but a set-off supposes a different demand, arising in a different right. It was said, that if the tenant had paid the ground-rent, and the landlord had afterwards repaid him, the latter could not avow for the whole rent; and my answer is this, that the payment there never was considered by both as a payment, and, if not, the whole rent remains due. I consider this case as a lease from the defendant to the plaintiff, at the annual rent of 50*l.*, out of which 5*l.* per annum was to be paid to the ground landlord; and therefore a payment of that ground-rent is a payment of so much rent to the defendant, and may be pleaded in answer to the avowry for rent. Neither can we suppose, upon this record, that the defendant ever repaid the plaintiff this ground-rent, for, if he had, he might have replied that fact." The landlord, therefore, generally speaking (for in some cases it is taken from him by statute), has the option of repaying the tenant the sum disbursed by him to discharge the prior claim upon the land, and may thus prevent the disbursement from being consi-

dered as a payment of so much of the rent; and the tenant may, in like manner, elect not to consider it as such, and may signify his election by bringing an action for the amount, or setting it off in an action brought by his landlord against him for any other debt. And, indeed, in some cases he *must* do so; for if he owe no rent or not enough to cover the sums he has been forced to pay, he has no other means of reimbursing himself.

It is, however, necessary to remark, that there are some cases which qualify the generality of the doctrine just laid down, by compelling the tenant to avail himself of his right to deduct within a given period, if at all. The property-tax, by 46 Geo. 3, c. 64, was directed to be paid by the occupier, who was required to deduct it out of the next rent. In *Denby v. Moore*, 1 B. & A. 130, the plaintiff occupied land, and paid the property-tax for about twelve years, and also paid the full rent during that time, and it was held that he could not recover back again the amount of rent thus over-paid. This case, indeed, was decided upon grounds not much akin to the subject of this note, for the action was for *money had and received* to recover back the rent over-paid, not for *money paid* to the defendant's use on account of property-tax. And the court thought that, as the occupier had made the over-payments with full

knowledge of the facts, he could not recover them back again; besides, the words of the Act were express, requiring the occupier to deduct the tax from the rent next due, and there were good reasons for insisting on his doing so. And therefore, in *Stubbs v. Parsons*, Bayley, J., said, "that he laid *Denby v. Moore* out of the question, that decision being on the express words of the Property Act to prevent frauds on the revenue." *Andrew v. Hancock*, 1 B. & B. 37, was, like *Sapsford v. Fletcher*, an action of replevin, and the defendant having avowed for six months' rent due the 29th of September, 1818, the plaintiff pleaded in bar various payments of land-tax and paving rates made to prevent his goods from being distrained between 1812 and 1818, while he was tenant to the defendant, which payments he claimed to deduct from the rent avowed for. The plea was decided to be bad; principally, however, upon the express words of the Acts of Parliament, by which, to use the words of Dallas, C. J., the tenant was not only *allowed*, but *required*, to deduct these payments out of the rents of the then current years. In *Stubbs v. Parsons*, 3 B. & A. 516, a similar question again arose with respect to land-tax, that also was an action of replevin, *cognisance* for a quarter's rent due the 25th of March, 1819. The plaintiff pleaded a tender as to part, and as to the residue, that

before the 25th of March, and before the said time when, &c., divers sums, amounting to the residue, had been from time to time assessed on the premises for land-tax, which he had been compelled to pay. On demurrer the plea was held bad, because it did not state when the land-tax claimed to be deducted was assessed or paid; and it was consistent with the plea that it might have been a payment for land-tax due before the rent distrained for either accrued or was accruing, or even before the commencement of the present landlord's title. "The ground," said Bayley, J., "on which my judgment proceeds is, that a payment of the land-tax can only be deducted out of the rent which has then accrued, or is then accruing, due; for the law considers the payment of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord. And if, afterwards he pays the rent in full, he cannot at a subsequent time deduct that over-payment from the rent. *He may, indeed, recover it back as money paid to the landlord's use*," "The occupier," said Holroyd, J., "has a lien on the next rent, given him by the legislature, for the land-tax paid by him; but if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off." The same rule has been applied to payments of property-tax, *Cumming v. Bedborough*,

15 M. & W. 438; [and of expenses under the Metropolitan Building Act, *Earle v. Maughan*, 14 C. B. N. S. 626].

The next question is, whether the limitation in point of time established by these cases, with respect to deductions of land-tax, applies to deductions in respect of rent paid, under dread of distress, to the superior landlord, or in respect of arrears of a rent-charge. In order to solve this question we cannot have recourse, as in case of taxes, to the express words of the legislature; we must, therefore, resort to principles of common sense and general convenience. And it seems not unreasonable, that if a tenant, having made such payments, fail to deduct at the next opportunity, he should be taken to have abandoned his right to do so, and to have elected to rely upon his right of action for money paid to the landlord's use; and, indeed, Park, J., in *Carter v. Carter*, 5 Bing. 409, 410, appears to have considered that this point was decided by *Andrew v. Hancock*, to which he refers as to a case of ground-rent. Yet it would be hard to preclude the tenant from deducting from any rent not actually due or accruing at the time of his making the payments in respect of which he claims the right of deduction; for the arrears of rent-charge or head-rent may be extremely heavy, and may cover much more than the amount of the rent then due or accruing from him

to his landlord. In order, therefore, to do full justice, he ought to be allowed, after making such a payment, to retain the rent for as many succeeding rent-days as may be necessary to place him *in statu quo*, for he cannot prescribe to the head landlord or incumbrancer when to insist on payment, and therefore ought not to suffer by their delay.

But it seems reasonable, that the tenant's right to deduct should only exist in respect of payments made by him of arrears which accrued due in the time of the landlord against whom he claims the deduction. Suppose, for instance, premises be let for 100*l.* a year, and subject to a head-rent of 10*l.* a year, of which five years are in arrear when the mesne landlord assigns his reversion: upon the sixth year falling due the head landlord threatens to distrain, and the tenant is obliged to pay him 60*l.*: shall he deduct the whole of that sum from his current year's rent, or only the 10*l.* which fell due during his present landlord's time? It would be hard upon the assignee to adopt the former part of this alternative.

The right to deduct a payment in respect of ground-rent has not been confined to tenants, for in *Doe v. Hare*, 4 Tyrwh. 29 [S. C. 2 C. & M. 145], the plaintiff, having recovered in ejectment on a demise from the 5th of June, 1830, brought an action for the mesne

profits between that day and the 4th of June, 1832, when the sheriff executed the *ha. fa. po.* The defendant was allowed, in reduction of damages, a payment in respect of ground-rent which had become due the 24th of June, 1830, and also two other payments of ground-rent which fell due during his occupation. [In the modern case of *Barber v. Brown*, 1 C. B. N. S. 121, the principle of *Doe v. Hare* was acted on. In that case the owner of the reversion expectant upon a term out of which an underlease *pur autre vie* had been granted, having become tenant from year to year to the underlessees, and having by mistake, after the dropping of the lives, continued to pay rent to the representatives of the underlessees, it was held, in an action brought by him against them to recover the amount so paid, that they were entitled to deduct payments of ground-rent, and also of rates and taxes.

In *Walker v. Bartlett*, Cam. Scac., 18 C. B. 845, it was held that the buyer of shares in a mining company had impliedly promised to indemnify the seller against calls made on him subsequently to the sale, and to which he was liable by reason only of the omission on the part of the buyer to cause himself, or some one else, to be registered as owner of the shares.]

CHANDELOR v. LOPUS.

PASCHÆ.—1 JACOBI 1.

[REPORTED 2 CROKE, 2.]

The defendant sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, but which proved not to be so. No action lies against him, unless he either knew that it was not a Bezoar stone, or warranted it to be a Bezoar stone.

ACTION upon the case: whereas the defendant, being a goldsmith, and having skill in jewels and precious stones, had a stone, which he affirmed to Lopus to be a Bezoar stone, and sold it to him for a hundred pounds; *ubi reverâ*, it was not a Bezoar stone.

The defendant pleaded, *Not guilty*.

After verdict, and judgment for the plaintiff in the King's Bench, error was therefore brought in the Exchequer Chamber; because the declaration contains not matter sufficient to charge the defendant, *viz.*, that he warranted it to be a Bezoar stone, or that he knew that it was not a Bezoar stone; for, it may be, that he himself was ignorant whether it were a Bezoar stone or not.

And all the Justices and Barons (besides Anderson) held, that for this cause it was error. For the bare affirmation that it was a Bezoar stone, without warranting it to be so, is no cause of action. *And although he knew it to be no Bezoar stone, it is not material.** For every one, in selling of his wares will affirm that his wares are good, or the horse that he sells is sound: yet, if he warrants them not to be so, it is no cause of action. And the warranty ought to be made at the same time as the sale.†

** This proposition, which was not necessary to the decision, has often been denied. See the notes, post: and the argument for the plaintiff in error in this very case admits the contrary.*

† For, if made afterwards, there is no consideration for it. Finch, L. 189. 3 Bl. Comm. 166. [Roscorla v. Thomas, 3 Q. B. 324. To avoid contract, fraudulent misrepresentation need not have been at the time of making the contract, per Lord Wensleydale, Smith v. Kay, 7 H. of L. 750.]

Fitz. Nat. Brev. 94 c. & 98 b.; 5 H. 7. 41; 9 H. 6. 53; 12 H. 4. 1; 42 Ass. g. 7; 7 H. 4. 15. Wherefore, forasmuch as no warranty is alleged, they held the declaration to be ill. But *Anderson* to the contrary; for the deceit in selling it for a Bezoar, whereas it was not so, is cause of action. But notwithstanding it was adjudged to be no cause, and judgment was reversed.

IF the plaintiff in this case were to declare upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that *every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended*. See *Power v. Barham*, 4 A. & E. 473; *Shepherd v. Kain*, 5 B. & A. 240; *Freeman v. Baker*, 2 N. & M. 446; [*Hopkins v. Tanqueray*, 15 C. B. 130; *Carter v. Crick*, 4 H. & N. 412; and *Stuckley v. Baily*, 1 H. & C. 405, S. C., 31 L. J. Exch. 483]. Even where there is a written memorandum relating to the subject-matter of the representation; *Allen v. Pink*, 4 M. & W. 140. See *Wright v. Crookes*, Scott, N. R. 685; *Jeffrey v. Walton*, 1 Stark. 267; provided it do not purport to be a complete contract; *Harnor v. Groves*, 15 C. B. 667. (See *Taylor v. Bullen*, 5 Exch. 779, as to a sale with all faults.) If not, he would at all events succeed, if he were to sue in *tort*, laying a *scienter*, since the fact of the defendant's being a jeweller would be almost irresistible evidence that he knew his representation to be false.

When *Chandelor v. Lopus* was decided, as the action of *assumpsit* was by no means so distinguishable from *case*, ordinarily so called, as at present; so the distinction was not then clearly recognised, which is now, however, perfectly established, between an action upon a warranty express or implied, which is founded on the defendant's promise that the thing shall be as warranted, and in order to maintain which it is unnecessary that he should be at all aware of the fallacious nature of his undertaking, and the action upon the case for false representation, in order to maintain which, the defendant must be shown to have been actually and fraudulently cognisant of the falsehood of his representation, [or to have made the representation fraudulently without belief that it was true; *Taylor v. Ashton*, 11 M. & W. 415]; actions of the former description being then usually framed in *tort*, under the name of *actions for deceit*. See *Williamson v. Allison*, 2 East, 446; *Shrewsbury v. Blount*, 2 M. & Gr. 475, 2 Scott, N. R. 588, S. C.; the observations of Grose, J., in *Pasley v. Freeman*,

3 T. R. 54, and of Tindal, C. J., in *Budd v. Fairmaner*, 8 Bing. 53; [*Behn v. Kemble*, 7 C. B. N. S. 260]; *Steuart v. Wilkins*, Dougl. 18, is said by Lawrence, J., in 2 East, 451, to have been the *first* case where the question was regularly discussed, and the mode of declaring in *assumpsit* established. However, the main doctrine laid down in *Chandelor v. Lopus* has never since been disputed, *viz.*, that the plaintiff must either declare upon a contract, or, if he declare in *tort* for a misrepresentation, must aver a *scienter*. That such an action is maintainable when the *scienter* can be proved, though there be no warranty, is now (notwithstanding the *dictum* in the text) well established. *Dunlop v. Waugh*, Peake, 223; *Jendwine v. Slade*, 2 Esp. 572; *Dobell v. Stevens*, 3 B. & C. 625; *Fletcher v. Bowsher*, 2 Star. 561; [and see the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76,) sched. (B), form 21].

It is sometimes not very easy to determine whether an action of *assumpsit* upon a warranty should be brought against the vendor of a chattel, or whether the proper remedy be by action upon the case for misrepresentation. We have already observed, that every affirmation respecting the chattel, made, at the time of sale, by its vendor, is a warranty *if so intended*. But it is sometimes far from easy to decide, whether a particular assertion was, or was

not, intended for a warranty; and, if it turn out to have been meant merely for a representation, the plaintiff suing on it must aver a *scienter* in his declaration, and must not treat it as a warranty, but will be defeated [in the absence of amendment] unless it turn out to have been false within the knowledge of the party making it. Such was the case of *Budd v. Fairmaner*, 8 Bing. 52, where the plaintiff, in order to prove the warranty, put in the following instrument, signed by the defendant: "Received of Mr. Budd, 10*l.* for a grey four-year-old colt, warranted sound in every respect." It was held at *Nisi Prius*, and afterwards by the court in banc, that the warranty applied only to the soundness, and that the age was mere matter of description, and the plaintiff, who had sued as upon a warranty of the age, was nonsuited. [Where it is questionable which of the two forms of action is appropriate, the plaintiff should avail himself of the Common Law Procedure Act, 1852, s. 41, and join both in the same declaration.]

With respect to actions upon the case for a false representation, although the declaration always imputes to the defendant fraud, and an intent to deceive the plaintiff; and although it is expressly laid down that "fraud and falsehood must concur to sustain this action," per Gibbs, C. J., *Ashlin v. White*, Holt, 387; still, in order to *prove* such fraud as the law

considers sufficient to sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, or asserted [either] recklessly without any knowledge upon the subject, per Maule, J., *Evans v. Edmunds*, 13 C. B. 777, *semble* (see *Pulsford v. Richards*, 17 Beav. 87), [or without belief that it was true, *Taylor v. Ashton*, 11 M. & W. 415, where in the seventh line from the bottom of the page, "true" should be corrected to "untrue"], and with an intention to induce another to act on the faith of it, and alter his position to his damage, *Thom v. Bigland*, 8 Exch. 725, (where the report of the judgment of Parke, B., at page 731, fourth line from bottom, should be corrected by changing "or" into "and," and striking out the word "fraudulent," [see 9 Exch. 426, n. (a)],) and that it occasioned damage to the plaintiff; *Foster v. Charles*, 6 Bing. 396, 7 Bing. 108; *Corbet v. Brown*, 8 Bing. 433; [*Collins v. Cave*, 4 H. & N. 225, in error, 6 H. & N. 131; *Eastwood v. Bain*, 28 L. J. Exch. 74]. For which purpose it must appear that the plaintiff relied upon it. See *Atwood v. Small*, 6 Cl. & F. 232; *Vigers v. Pike*, 8 Cl. & F. 562; *Shrewsbury v. Blount*, 2 Scott, N. R. 588, 2 M. & Gr. 475; though it should seem, that the fact of a misrepresentation having been made, and a course pursued into which that misrepresentation was

calculated to mislead, is *prima facie* evidence that the plaintiff was misled by it, *Watson v. Earl of Charlemont*, 12 Q. B. 856. [It need not be in terms expressly stating the existence of some untrue fact, see the judgment of Crompton, J., *Lee v. Jones*, 34 L. J. C. P. 131, in Cam. Scacc. The averment that a misrepresentation was made to the plaintiff, may be proved without showing that the statement complained of was addressed to the plaintiff individually; for a statement to the public at large is in effect a statement to every individual whom it reaches; see the judgment in *Gerhard v. Bates*, 2 E. & B. 476; *McKune v. Johnson*, 5 C. B. N. S. 218; *The New Brunswick, &c., Railway Co. v. Conybeare*, 9 H. of L. C. 711; S. C. 31 L. J. Cha. 297; *Kisch v. Central Railway Co., &c.* 34 L. J. Cha. 545; and *Scott v. Dixon*, 29 Law J., Exch. 62, note (3), where the director of a banking company was held liable to a person who was not a shareholder in the company for having made a misrepresentation in a report which was only addressed to the shareholders, but intended for the information of all who were likely to have dealings with the bank. In *Denton v. The Great Northern Railway Co.*, 5 E. & B. 860, the fraudulent representation was the advertisement in a time table, published and kept in circulation by the defendants, of a train which had ceased to run. In *Bagshaw*

v. *Seymour*, 18 C. B. 903, affirmed in Dom. Proc., June, 1858, S. P. *Bedford v. Bagshaw*, 4 H. & N. 538, an action of deceit was held to lie in respect of a misrepresentation which had not been made to the plaintiff. In that case the plaintiff had been induced to purchase shares by seeing them quoted in the official list of the committee of the Stock Exchange, and the shares would not have been so quoted but for fraudulent misrepresentations made by the defendant to the committee, with intent to induce the public to purchase the shares, in the belief that their insertion in the list had been honestly procured.] In *Polhill v. Walter*, 3 B. & Ad. 122, the defendant, who had formerly been in partnership with Hancorne, and still carried on business in the same house, accepted, as *per procuration* of Hancorne, a bill drawn on the latter. The bill was afterwards indorsed to the plaintiff, who gave value for it, and having been dishonoured by Hancorne, the plaintiff sued the defendant for "falsely and fraudulently pretending to accept the same by procuration of Hancorne." At the trial, the jury being directed by Lord Tenterden to find for the defendant if they thought there was no fraud, otherwise for the plaintiff, found a verdict for the defendant: his Lordship giving the plaintiff leave to move to enter a verdict; which motion was accordingly made, and the rule to

enter the verdict for the plaintiff ultimately made absolute.

"If," said Lord Tenterden, delivering the judgment of the court, "the defendant when he wrote the acceptance, and thereby in substance represented that he had authority from the drawer to make it, knew that he had no such authority (and upon the evidence there can be no doubt he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence." See *Pontifex v. Bignold*, 3 Scott, N. R. 390, 3 M. & Gr. 63, S. C.; [and *Owen v. Van Uster*, 10 C. B. 318, where a member of a mining company who had, without authority from the other members, accepted *per proc.* for the company a bill drawn upon the company, was held to be personally liable on the bill as acceptor.

A peculiar class of cases connected with this subject must here be mentioned. In *Randell v. Trimen*, 18 C. B. 786, the declaration alleged that the defendant falsely and fraudulently represented to the plaintiffs that he was authorised to order stone of them for A., upon which representation the plaintiffs acted, and supplied the stone, and A refused to pay for it; and that the plaintiffs having sued A. had failed, and had been obliged to pay his costs: the judge who tried the case at the *Nisi Prius*, told the

jury that if the defendant had made the representation, and it was untrue, the plaintiffs were entitled to recover from him the price of the stone and the costs of the action against A. The jury found for the plaintiffs, and upon the argument of a rule for a new trial, Jervis, C. J., expressed an opinion that the defendant was liable, even supposing he believed the representation to be true; but the learned judge must not be taken to have meant that in such case the defendant was liable to the kind of action which had been brought against him. See *Oxenham v. Smythe*, 6 H. & N. 690; 31 L.J. Exch. 110. Formerly, it seems to have been assumed that the remedy against a person contracting on behalf of another without authority, was either by action on the *case* for the false representation, or by action against him as principal on the original contract; and, therefore, when *Jenkins v. Hutchinson*, 13 Q. B. 744, and *Lewis v. Nicholson*, 18 Q. B. 503, established the rule that a person contracting without authority as agent for a named principal, is not liable on the contract *as principal*, it was an open question whether the professed agent was liable at all, since if he entered into the contract under the honest belief that he was possessed of authority to bind the supposed principal, he could not be liable to an action for a fraudulent representation. It was, how-

ever, suggested by the court in *Lewis v. Nicholson* (and a remark previously made by Erle, J., in *Jenkins v. Hutchinson*, would lead to the same conclusion), that in these cases the facts would support an action upon a warranty by the defendant that he had the authority which he assumed to have. Not long afterwards such an action was brought and held to lie. In *Collen v. Wright*, 7 E. & B. 301; S. C. 26 Law J., Q. B. 147, the defendant's testator had, as agent for one Gardner, signed an agreement with the plaintiff to let him some land belonging to Gardner upon certain terms. The testator, in fact, had not (though he believed that he had) authority to let the land on those particular terms. The plaintiff took possession of the land, laid out money upon it, and on Gardner's repudiating the agreement, filed a bill for specific performance against him, which bill was dismissed. Upon these facts the court held, in accordance with their previous suggestion, that the testator had warranted that he was authorised to enter into the agreement, and that for the breach of that warranty he was liable to pay damages, including the amount of the costs incurred by the plaintiff in the Chancery suit. *Collen v. Wright* was a special case stated without pleadings; it was followed by *Simons v. Patchett*, 7 E. & B. 568; S. C. 26 Law J., Q. B. 195, in which case appears the first reported pre-

cedent of a declaration on such a warranty, or promise of authority. In that case, the first count alleged that in consideration that the plaintiff would make a contract with the defendant as and assuming to be agent for a certain firm, the defendant promised the plaintiff that he was authorised by that firm to make the contract as agent for them, that the contract was so made, and that the defendant had not authority to make it. The second count was upon a like promise, that the defendant had authority from the firm as agent for them to request the plaintiff to do work and provide materials for them. The defendant pleaded *non-assumpsit* and a denial of the breaches of promise. It appeared at the trial that he made the contract as agent for the firm, and in so doing exceeded his authority; and upon these facts his liability, according to *Collen v. Wright*, was not questioned. Afterwards *Collen v. Wright* was affirmed by the Exchequer Chamber (8 E. & B. 647), Cockburn, C. J., differing from the rest of the court. The nature of the obligation of the professed agent in such cases, was said by Willes, J., in delivering the judgment of the majority of the judges, in the court of error, "to be well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract

upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent as such, is a good consideration for the promise." See also the judgments of Willes, J., and Bramwell, B., in *Warlow v. Harrison*, 29 L. J. Q. B. 14. For an application of the same principle to another class of cases, see *Worthington v. Sudlow*, 2 B. & S. 508, S. C. 31 L. J. Q. B. 131.] The modern cases upon the subject of fraudulent misrepresentations are collected in the note to *Pasley v. Freeman*, post, vol. ii.

The first instance in which an action of *tort* for a misrepresentation respecting the ability of a third person was solemnly adjudged to be maintainable, is the case of *Pasley v. Freeman*, 3 T. R. 53, decided by Lord Kenyon, C. J., Ashurst, J., and Buller, J., against the opinion of Grose, J., A.D. 1789. See the case at large, post, vol. ii. It came before the court on motion in arrest of judgment, on a declaration, stating, "that the defendant, intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage and persuade them to deliver certain goods to Falch on credit, and for that purpose did falsely, deceitfully, and fraudulently assert that Falch was a person safely to be trusted, whereas, in truth, Falch was not a per-

son safely to be trusted, and the defendant well knew the same." One of the consequences of its introduction was to qualify considerably the effect of that enactment of the Statute of Frauds, which requires that guaranties should be in writing: since it frequently happened, that where one person had interested himself to procure credit for another, in a manner which would have been insisted upon as amounting to a guaranty but for the enactment of the Statute of Frauds, the expressions used by him in his endeavours to effect his purpose were relied on as representations respecting his friend's credit or character, and he was accordingly sued in the form of which *Pasley v. Freeman* has established the legitimacy. It was in order to prevent the Statute of Frauds from being thus trenched upon, that the legislature, in 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, enacted sec. 6, "that no action shall be maintained, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

This section of the act was elaborately discussed in the great case of *Lyde v. Barnard*, 1 M. & W. 101. It was an action on the case for falsely representing, in answer to inquiries on that subject, that the life-interest of Lord Edward Thynne in certain trust-funds was charged only with three annuities, whereby the plaintiff was induced to advance to the said Lord E. T. 999*l.* for the purchase of an annuity, secured by his covenant, bond, warrant of attorney, and an assignment of his life-interest in the said funds; whereas the defendant well knew that the said interest was charged not only with three annuities, but with a mortgage for 20,000*l.* At the trial, it appeared that the false representation was made by parol, on which the Lord Chief Baron nonsuited the plaintiff, conceiving the case to fall within the 9 Geo. 4, c. 14, s. 6. On the motion for a new trial, the court was equally divided, and the learned barons delivered elaborate opinions *seriatim*. Lord Abinger and Gurney. B., thought the case within the statute, conceiving the true construction to be, that the representation or assurance thereby required to be in writing, should concern or relate to the *ability* of the third person effectually to perform and satisfy an engagement of a pecuniary nature, into which he has proposed to enter, and on the faith of which he is to obtain money, credit, or goods; and con-

ceiving that the representation in this case did concern the *ability* of Lord E. T. to perform an engagement of a pecuniary nature, on the faith of which he was to obtain money, since it concerned his ability to give the plaintiff a sufficient security to repay him, by way of a life annuity, the money he was about to advance. "The ability of a man (it was urged) consists in the sources from which it is derived. He may have a landed estate unfettered by mortgage or other incumbrance, or a sum of money in the funds, or a large capital embarked in a successful trade, or a large balance in his banker's hands. Upon all or any one of these his general ability may depend. Can it be said that a representation of any one of these sources of ability has no relation to his general ability?" To this it may be added, that it is in the nature of things impossible that one man should be cognisant of another's general ability in any other way than by knowing a number of particular facts of this description, for a man's general ability consists of his property, *minus* his debts. With the amount of his property, a third person may be certain that he is, at least, to a certain extent, acquainted, by knowing the items that compose it. But how can any one be certain that he knows the amount of another's debts? Yet if those debts exceed his property, he is insolvent, and his general ability

amounts to nothing. It is true, that, the larger his property, the more numerous and valuable its items, the smaller is the likelihood that his liabilities should exceed it; which plainly shows, that to arrive at any estimate of a man's general ability, the items of his property are mainly to be taken into consideration. On the other hand, Parke and Alderson, Barons, conceived that the representation in question did not appear to relate to "the character, conduct, credit, ability, trade, or dealings" of Lord Edward Thynne; and therefore, did not fall within the statute. "It does not," it was urged, "concern or relate to his *character*, or to his *credit*; it does not relate to his *conduct*, *trade*, or *dealings*, for it is totally immaterial with reference to the inquiry and the answer to it, who had incumbered the fund; the only question in substance being, to what extent it was incumbered. And it does not concern or relate to his *ability*; for that word, especially when we look at those which accompany it, means, in its ordinary sense, some quality belonging to the third party, and not to the thing to be transferred. In order to bring the particular case within the statute, this last word is relied on, and it is said that the representation of the state of the fund relates to 'the ability' of the intended grantor of the annuity, that is, to his ability to fulfil his contract to charge the fund; or, if no con-

tract was made at the time of the representation (as there was not), then the phrase must be changed, and it must be said to relate to his ability to charge the fund. But this will hardly be sufficient to answer the exigency of the case: for there is really no question as to the power of the person to charge the fund, such as it is; it must, therefore, be said to relate to his ability to give security on a fund of adequate value. But this is a very forced construction of the word *ability*. It is true, that a representation as to the condition of, or value of, a particular part of a man's property, *may* relate to, or concern his character, credit, &c. It would do so, when the object of the inquirer is to give credit to the third person on his personal responsibility, and he is seeking information as to part of the means which constitute its value. But if it was doubtful whether the present representation was meant to relate to the state of the fund only, or to the state of the fund as an element of Lord Edward Thynne's personal credit, that question ought to have been submitted to the jury."

The court being equally divided, the rule would have been discharged, but the question being of great importance, a new trial was granted on payment of costs, in order that it might be raised upon the record. I am not, however, aware that it was so. The

point was again raised, but not decided, in *Townley v. Macgregor*, 6 Scott, N. R. 906, 6 M. & G. 46, S. C.; the plea which denied that the representation was in writing having been held at all events ill for argumentativeness. The opinion of Lord Abinger and Gurney, B., appears, however, to be reinforced by that of the Q. B. in *Swann v. Phillips*, 8 A. & E. 457.

In a subsequent case, the court of Queen's Bench held that though the action be for money had and received to recover cash obtained from the plaintiff by means of the misrepresentation, still if the misrepresentation constitute the whole of the plaintiff's case, parol evidence of it cannot be received. *Haslock v. Fergusson*, 7 A. & E. 6. Whether in a case depending partly but not wholly on such a misrepresentation, parol evidence would be admissible, [had not, when the fourth edition of this work was composed, been decided; but since that time, in a case where the plaintiff had been induced to incur the damage complained of partly by the written representation and partly by oral representations of the defendant, a ruling that the plaintiff was entitled to the verdict, if she was *substantially and mainly influenced by the written representation*, was upheld by the court of error upon a bill of exceptions. See *Tatton v. Wade*, 18 C. B. 371.]

The act applies to a misrepresentation by one partner respecting the credit of the firm. *Devaux v. Steinkeller*, 6 Bing. N. C. 84.

The action for a misrepresentation in the nature of deceit seems to be an exception from the general rule, that in actions for words, or special damage arising therefrom, the very words must be set out, *Gutsole v. Mathers*, 5 Dowl. 70, 1 M. & W. 495; *Bailey v. Walford*, 9 Q. B. 197.

As to the effect of simple concealment of defects upon a contract of sale, see *Keates v. Lord Cadogan*, 10 C. B. 591; [*Horsfall v. Thomas*, 1 H. & C. 90; S. C. 31 L. J. Exch. 322]. As to the effect of fraudulent misrepresentations of the purpose for which the subject of demise was to be used upon the validity of a lease, see *Feret v. Hill*, 15 C. B. 207. [This subject was much considered in *Reg. v. Sadler's Co.*, 4 B. & S. 570; S. C., 30 L. J. Q. B. 186, 194; in Dom. Proc. 10 H. of L. C. 404; and 32 L. J. Q. B. 337.

Where a person has been induced to buy goods by a fraudulent misrepresentation, he is in general not only entitled to sue the seller for the fraud, but may also on discovering it, rescind the contract, and if he has paid the price, recover it back under a count for money had and received to his use, provided he can restore the article sold in the same state as that in which he received it; *Clarke v. Dixon*, E. B. & E. 148,

and the cases there cited. But where the false representation amounts only to a warranty, and the sale is of a specific ascertained article, no such remedy exists; for in such cases the property (unless the contrary appears to have been intended by the parties) passes by the sale; *Dixon v. Yates*, 5 B. & Ad. 340; *Gilmour v. Supple*, 11 Moore, P. C. C. 551; and the warranty being merely a collateral undertaking in consideration of the contract of sale, a breach of it affords no ground for rescinding the contract. See *Foster app.*, *Smith*, resp., 18 C. B. 156; and the judgments in *Street v. Blay*, 2 B. & Ad. 456; and *Mondel v. Steele*, 8 M. & W. 858. The term warranty is, however, constantly applied (notwithstanding the protest of Lord Abinger, in *Chanter v. Hopkins*, 4 M. & W. 404) to descriptions given of the subject-matter of the sale, in cases where the sale is not of a specific article, but only of a certain description of article; cases, therefore, where the property cannot pass by the bargain; see *Atkinson v. Bell*, 8 B. & C. 277; *Mucklow v. Mangles*, 1 Taunt. 218. In such cases, the so-called warranty is a condition precedent to the purchaser's liability to accept or pay, and if the article tendered does not correspond with the given description, the purchaser is entitled to reject it, and (if he has paid for it) to recover the price as money received to his use. See *Lucy v. Moufflet*, 5 H. & N. 229; *Allan v.*

Lake, 18 Q. B. 560; *Wieler v. Schilizzi*, 17 C. B. 619; *Macdonald v. Longbottom*, 1 E. & E. 977, S. C. 28 Law J., Q. B. 292; *Bannerman v. White*, 10 C. B. N. S.; S. C. 31 L. J. C. P. 28; *Josling v. Kingsford*, 13 C. B. N. S. 447. Questions of much nicety often arise in considering whether the inferior character of an article which the parties have treated as the subject of a sale renders it not an article of the kind of which it was supposed to be on the sale, or is merely a breach of a collateral warranty. If the case is of the former class, as where a gilt bar is innocently sold as a bar of gold, the purchaser may recover the price paid as money received to his use; if the case belongs to the latter class, the only remedy open to him is an action for the breach of warranty. See *Jones v. Ryde*, 5 Taunt. 488; *Dawson v. Collis*, 10 C. B. 523; *Gompertz v. Bartlett*, 2 E. & B. 849; *Gurney v. Womersley*, 4 E. & B. 133; *R. v. Bryan*, 1 Dear. & B. C. C. R. 98; S. C., 26 Law J., M. C. 84; *Couturier v. Hastie*, 8 Exch. 40, reversed in error, Cam. Scacc. 9. Exch. 102; Dom. Proc. 5 H. of Lords Cases, 102; *Hall v. Conder*, 2 C. B. N. S. 22; *ib.* 89; *Pooley v. Brown*, 11 C. B. N. S. 566; S. C. 31 L. J. C. P. 134; *Hopkins v. Hitchcock*, 14 C. B. N. S. 65. — As to the admissibility of parol evidence in Chancery, to show that the parties to a written instrument of sale were mistaken as to the subject of it, see *Price v. Ley*, 34 L. J. Cha. 530.]

COGGS v. BERNARD.*

TRINITY.—2 ANNÆ.

[REPORTED LORD RAYMOND, 909.]

If a man undertakes to carry goods (a) safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage.

IN an action upon the case, the plaintiff declared, *quod cum Bernard* the defendant, the 10th of November, 13 Will. 3, &c., *assumpsisset, salvo et secure elevare, Anglicè* to take up several hogsheads of brandy then in a certain cellar in *D. et salvo et secure deponere, Anglicè* to lay them down again in a certain other cellar in *Water-lane*: the said defendant and his servants and agents, *tam negligenter et improvidè*, put them down again into the said other cellar, *quod per defectum curæ ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, *viz.*, so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

Gould, J. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way; and that any man that undertakes to carry goods, is liable

S. C. Com. 133.
Salk. 26.
3 Salk. 11.
Holt. 13.
Entry. Salk.
735. Raym.
vol. 3, p. 240.

* There is a report of this case, *tot. verb.*, in the *Hargrave MSS.* No. 68, and 182, therein said "to be transcribed from the MS. Reports of *Herbert Jacob, Esq.*, of the *Inner Temple*, written with his own hand."

(a) *Vide* Jones on Bailments, 60.

Gould, J.

to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage; and if a *præmium* be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 Hen. 6. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears: if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. So is Doct. et Stud. 129, upon that difference. The same difference is, where he comes to goods by finding. Doct. et Stud. *ubi supra*. Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160. 2 Hen. 7. 11. 22 Ass. 41. 1 R. 10. Bro. Action sur le case, 78. *Southcote's* case is a hard case indeed, to oblige all men that take goods to keep to a special acceptance that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of; and indeed it appears by the report of that case in Cro. Eliz. 815, that it was adjudged by two judges only, *viz.*, *Gawdy* and *Clench*. But in 1 Vent. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l.*; the defendant showed that he locked the money up in his master's warehouse, and it was stolen from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms.

Powys, J., agreed upon the neglect.

POWYS, J.

Powell, J. The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend, when there is not any particular neglect shown? And I hold, an action will lie, as this case is. And in order to make it out, I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and *gist* of this action; and then, thirdly, I shall consider *Southcote's* case.

1. Those authorities in the Register, 110, a. b. of the pipe of wine, and the cure of the horse, are in point; and there can be no answer given them, but that they are writs which are framed short. But a writ upon the case must mention everything that is material in the case; and nothing is to be added to it in the count, but the time and such other circumstances (*a*). But even that objection is answered by Rast. Entr. 13, c. where there is a declaration so general. The year-books are full in this point. 43 Edw. 3. 33, a. there is no particular act showed; there indeed the weight is laid more upon the neglect than the contract. But in 48 Edw. 3. 6. and 19 Hen. 6. 49. there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 Hen. 7. 11, 7 Hen. 4. 14. these cases are all in point, and the action adjudged to lie upon the undertaking.

(a) [Not so now. See "The Common Law Procedure Act," 1852, ss. 2 & 3.]

2. Now to give the reason of these cases, the *gist* of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. (*b*). So it is 1 Jones, 179, Palm. 548; for the bailee is not bound upon

(b) [See the observations of the Court in *Taylor v. Caldwell*, 3 B. & S. 826; S. C. 32 L. J. Q. B. 164.]

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any undertaking against the act of God. Justice *Jones*, in that case, puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case; for the action there is founded upon the ferryman's act, *viz.*, the 'overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he had taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration: but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the (a) action would have lain upon that special undertaking. But there the action was laid generally.

(a) *Vide Com.*
627 Burr.1638.

3. *Southcote's* (a) case is a strong authority; and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events: that is hard. Coke reports the case upon that reason; but makes a difference where a man undertakes a case specially, to keep goods as he will keep his own. Let us consider the reason of the case: for nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Edw. 4. 40. b. there is such an opinion by *Danby*. The case in 3 Hen. 7. 4. was of a special bailment, so that that case cannot go very far in the matter. 6 Hen. 7. 12. there is such an opinion, by the by. And this is all the foundation of *Southcote's* case. But there are cases there cited which are stronger against it, as 10 Hen. 7. 26. 29 Ass. 28. the case of a pawn. My lord Coke would distinguish that case of a pawn from a bailment because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep, 8 Edw. 2. Fitzh. Detinue, 59, the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers do not know that difference; or, however it may be with them, half mankind never heard of it. So, for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if (b) a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

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(a) That notion in *Southcote's* case, 4 Rep. 83, b. that a general bailment, and a bailment to be safely kept, is all one, was denied to be law by the whole court, *ex relatione m^{ri} Bunbury*.

(b) *Vide Jones*, 44.

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Holt, C. J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case; and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments.

1. (a) *Vide Jones*,
35.
(b) Just. Inst.
lib. 3. tit. 15.
text 3.

2.

- (c) *Ibid.* text
2. The refer-
ences to the
Inst. in this
case are by
Serj. Hill.

3.

4.

And (a) there are six sorts of bailments. The first sort (b) of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote's case*. The second sort is, when goods or chattels that are useful are lent to a friend *gratis*, to be used by him; and this is called *commodatum* (c), because the thing is to be restored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in *Latin*, *vadium*, and in *English*, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who

delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the (a) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me; where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But (b) my Lord *Coke* has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him (c). For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter; and by them show, that

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(a) *Vide Jones*,
36.

(b) *Vide L.*
Ray. 655.
Jones, 46.

(c) *Vide Jones*,
46, 62.

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there never was any such resolution given before *Southcote's* case. The 29 Ass. 28 is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2 Fitzh. Detinue, 59, where goods are locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should not answer for the goods; that case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest: for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4. 40. b. was but a debate at bar; for *Danby* was but a counsel then: though he had been chief justice in the beginning of Edw. 4. yet he was removed, and restored again upon the restitution of Hen. 6. as appears by Dugdale's *Chronica Series*. So that what he said cannot be taken to be any authority, for he spoke only for his client; and *Genny*, for his client, said the contrary. The case in 3 Hen. 7. 4, is but a sudden opinion, and that by half the court; and yet, that is the only ground for this opinion of my Lord *Coke*, which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all chief justice *Pemberton's* time, and ever since, against the opinion of that case. When I read *Southcote's* case heretofore, I was not so discerning as my brother *Powys* tells us he was, to disallow that case at first; and came not to be of this opinion till I had well considered and digested that matter. Though, I must confess, reason is strong against the case, to charge a man for doing such a friendly act for his friend; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he (a) keeps the goods bailed to him

(a) Hanise
Vinn. p. 605.

but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. *A fortiori*, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3. c. 2. 99. b. '*Is apud quem res deponitur, re obligatur, et de eâ re, quam accepit, restituendâ tenetur, et etiam ad id, si quid in re depositâ dolo commiserit; culpæ autem nomine non tenetur, scilicet desidie vel negligentie, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.*' As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow (a). So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author; but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3. tit. 15. There the law goes further; for there it is said: '*Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidie ac negligentie, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati, id imputare debet.*' So that such a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words; yet even that would not charge him with all sorts of neglects; for if such a promise were put into writing, it would not charge so far, even then. Hob. 34. a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers. 3 Cro. 214, acc., 2 Cro.

(a) *Sed vide Doorman v. Jenkins*, 2 A. & E. 256, post 96, in notâ.

HOLT, C. J. 425, acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so when spoken. Doct. & Stud. 130. is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's* case. If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

As to the second sort of bailment, *viz. commodatum*, or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods, as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable: as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, *ubi supra*: his words are (a), '*Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruinâ, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alias eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatum domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel*

(a) This is cited from Bracton, but is in effect the text of Just. Inst. lib. 3. tit. 15. text 2.

prædonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur. Holt, C. J. I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put his horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care; but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b. (a): ‘*Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem (b) diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de quâ superius dictum est.*’ From whence it appears, that if goods are let out for a reward, the hirer is bound to the (c) utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (d) bailee shall not be answerable in this case, if the goods are stolen.

(a) Just. Inst. lib. 3. tit. 26. text 5.

(b) Vide Jones, 87.

(c) Comm. Vinn. in Just. Inst. lib. 3. tit. 25. text 5, n. 2, 3.

(d) D. acc. post. 1087.

As to the fourth sort of bailment, *viz. vadum*, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge; and, secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (e) the pawn

(e) S. P. 3 Salk. 268. Holt, 528. Salk. 522.

- HOLT, C. J. is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the (a) pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she (b) might use them: but then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then (c) the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompence for the meat. As to the second point, Bracton, 99, b. gives you the answer:—*Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis [ei] in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impediatur creditum petere (d).* In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's* case is. But, indeed, the reason given in *Southcote's* case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned
- (a) S. P. 3 Salk. 268. Holt, 528. Salk. 522.
- (b) *Ibid.* Vide Jones, 80, 81.
- (c) *Ibid.* Vide Jones, 80, 81. [Distress in effect a pledge cannot be used, *Bignell v. Clark*, 5 H. & N. 485; S. C. 29 L. J. Exch. 257.]
- (d) This is also the text of Just. Inst. lib. iii. tit. 15. text. 4. *De pignore.*

be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, *viz.* a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c.: which case of a master of a ship was first adjudged, 26 Car. 2, in the case of *Mors v. Shue*, Raym. 220. 1 Vent. 190, 238. The law charges this person thus entrusted to carry goods, against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law (a), for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort, are bailies, factors, and such like. And though a baily is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c., it is a good account. And the reason of his being a servant, is not the thing; for he is at a distance from his master, and

(a) Just. Inst.
lib. 4. tit. 5.
text 3. *Vide*
Vinn. Comm.
in Just. Inst.
lib. 3. tit. 27.
text 11. n. 2.

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acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his Commentaries upon Justinian, lib. 3. tit. 27. 684, defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, '*Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus et mandatis*.' I do not find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not

thought too old. But it is supported by good reason and Holt, C. J. authority.

The reasons are, first, because, in such a case, a neglect is a deceit to the bailor. For, when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7. 11. a strong case to this matter. There the case was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if, after, he does not look to them, an action lies. For here is his own act, *viz.* his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the (a) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man (b) will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6. 49. and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4. 33. this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a

(a) Vide Jones, 56, 57, 61.

(b) Just. Inst. lib. 3. tit. 27. text 11.

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carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court—what if he had built the house unskilfully?—and it is agreed in that case an action would have lain. There has been a question made, If I deliver goods to A., and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in *Yelv. 4.* judgment was given that the action would lie. But that judgment was afterwards reversed; and, according to that reversal, there was judgment afterwards entered for the defendant in the like case, *Yelv. 128.* But those cases were grumbled at; and the reversal of that judgment in *Yelv. 4.* was said by the judges to be a bad resolution; and the contrary to that reversal was afterwards most solemnly adjudged in 2 *Cro. 667. Tr. 21 Jac. 1.* in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors v. Slue*, was drawn by the greatest drawer in *England* in that time; and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I do not know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

THE case of *Coggs v. Bernard*, is one of the most celebrated ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord Holt contains the first well-ordered exposition of the English law of bailments. The point which the decision directly involves, *viz.*, that if a man undertake to carry goods safely, he is responsible for damage sustained by them in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage, is now clear law, and forms part of a general proposition in the law of principal and agent, which may be stated in the following words, *viz.* :—*The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.* See *Shillibeer v. Glynn*, 2 M. & W. 143; *Whitehead v. Greetham*, 2 Bing. 464. And this proposition includes cases stronger than that reported in the text. For there Bernard had undertaken to lay the goods down *safely*, whereby he introduced a special term into his contract; for it will be seen from the judgments, particularly Lord Holt's, that notwithstanding what was said by Lord Coke in *Southcote's* case, there is difference between the effect of a gratuitous undertaking to *keep* or *carry* goods, and a gratuitous undertaking to *keep* or *carry* them *safely*. The distinction ought, however, to be observed between

actual insurance of safety of the goods, and a contract to take due care for their safety. [See *Harrison v. The London and Brighton and S. Coast Rail. Co.*, 29 L. J. Q. B. 209; *Oakley v. The Portsmouth and Ryde Steam Packet Co.*, 11 Exch. 618.] The latter seems to include an obligation to carry safely; *Collett v. London and N. W. Rail. Co.*, 16 Q. B. 984; [see *Blake v. The G. W. Rail. Co.*, 7 H. & N. 987; S. C. 31 L. J. Exch. 346]. But, under the rule just laid down, a gratuitous and voluntary agent who has given no special undertaking, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound not to be guilty of gross negligence. This proposition is affirmed by several recent cases. In *Wilkinson v. Coverdale*, 1 Esp. 74, it was alleged that the defendant had undertaken *gratuitously* to get a fire policy renewed for the plaintiff, but had, in doing so, neglected certain formalities, the omission of which rendered the policy inoperative. Upon its being doubted at *Nisi Prius* whether an action would lie under these circumstances, Erskine cited a MS. note of Mr. Justice Buller in *Wallace v. Telfair*, wherein that judge had ruled, under similar circumstances, that, though there was no consideration for one party's undertaking to procure an insurance for another, yet, where a party voluntarily undertook to do it, and proceeded

to carry his undertaking into effect by getting a policy underwritten, but did it so *negligently* or *unskilfully* that the party could derive no benefit from it, in that case he should be liable to an action; in which distinction Lord Kenyon acquiesced. So in *Beauchamp v. Powley*, 1 M. & Rob. 38, where the defendant, a stage-coachman, received a parcel to carry *gratis*, and it was lost upon the road, Lord Tenterden directed the jury to consider whether there was *great negligence* on the part of the defendant, and the jury thinking that there was, found a verdict against him. So, too, in *Doorman v. Jenkins*, 2 A. & E. 256, in *assumpsit* against the defendant, as bailee of money entrusted to him to keep *without reward*, it was proved that he had given the following account of its loss, *viz.* that he was a coffee-house keeper, and had placed the money in his cash-box in the tap-room, which had a bar in it, and was open on Sunday, though the other parts of his house were not, and out of which the cash-box was stolen upon a Sunday. The Lord Chief Justice told the jury that it did not follow, from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that that fact afforded no answer to the action, if they believed that the loss oc-

curred from *gross negligence*. The jury having found a verdict for the plaintiff, the court refused to set it aside.

It is clear, from the above decisions, that a gratuitous bailee or other agent is chargeable when he has been guilty of *gross negligence*; and it is equally clear both from the words of the judges in several of the above-cited cases, and also from express decisions, that for no other kind of negligence will he be liable, except in the single case which shall by-and-by be specified. In *Doorman v. Jenkins*, Patteson, J., says, "It is agreed on all hands that the defendant is not liable, unless he has been guilty of *gross negligence*." "The counsel," says Taunton, J., "properly admitted, that as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action could not be maintainable except in the case of *gross negligence*." In *Shiells v. Blackburne*, 1 H. Bl. 158, the defendant having received orders from his correspondent in Madeira to send a quantity of cut leather thither, employed Goodwin to execute the order. Goodwin accordingly prepared it, and sent it, along with a case of leather of the same description belonging to himself, to the defendant, who, to save the expense of two entries, *voluntarily* and *without compensation*, by agreement with Goodwin, made one entry of both cases, but entered them by mistake as

wrought leather, instead of dressed leather, in consequence of which mistake the cases were both seized; and an action having been brought by the assignees of Goodwin, who had become bankrupt, against the defendant, to recover compensation for the loss, the general issue was pleaded, and there was a verdict for the plaintiff, which the court set aside, and granted a new trial, upon the ground that the defendant was not guilty either of *gross negligence* or fraud. This case was much remarked upon in *Doorman v. Jenkins*, which it resembled in the circumstance that the bailee in each case lost property of his own along with that which had been entrusted to him. "The case of *Shiells v. Blackburne*," says Taunton, J., "created at first some degree of doubt in our minds. It was said that the court in that case treated the question as a matter of law, and set aside the verdict, because the thing charged, *viz.* the false description of the leather in the entry, did not amount to *gross negligence*, and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found that in fact the defendant had been guilty of negligence, but the court thought they had drawn a wrong conclusion as to that fact." In *Dartnall v. Howard*, 4 B. & C. 345, the declaration stated, that in consideration that the plaintiff, at the request of the

defendants, would employ them to lay out 1,400*l.* in purchasing an annuity, the defendants promised to perform and fulfil their duty in the premises, and that they did not perform or fulfil their duty, but, on the contrary, laid out the money in the purchase of an annuity on the personal security of H. M. Goold and Lord Athenry, who were both in insolvent circumstances. The court, after verdict, arrested the judgment upon the ground that the defendants appeared to be *gratuitous* agents, and it was not averred that they had acted either with negligence or dishonesty. See also *Bourne v. Diggles*, 2 Chitt. 311; *Moore v. Mogue*, Cowp. 480; [and *Chanter v. Money*, 12 Ir. C. L. 161].

From the two classes of cases just enumerated, it is plain that an unpaid agent is liable for *gross negligence*, and equally plain that he is liable for nothing less. From the latter of these propositions there is, however, as has been already stated, one exception, and it is contained in the following words of Lord Loughborough, when delivering judgment in *Shiells v. Blackburne*:—"I agree," said his lordship, "with Sir William Jones, that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for *gross negligence*. But if a man *gratuitously* undertakes to do a thing to the best

of his skill, *when his situation or profession is such as to imply skill*, an omission of that skill is imputable to him as *gross negligence*. If, in this case, a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in *them* be *gross negligence*, because *their* situation and employment necessarily imply a competent degree of knowledge in making such entries." It perhaps may be more correct to call this a distinction engrafted on the general doctrine, than an exception from it: since it does not render any unpaid agent liable for less than *gross negligence*; but renders that *gross negligence*, in some agents, which would not be so in others. See *Wyld v. Pickford*, 8 M. & W. 443; [*Harmer v. Cornelius*, 5 C. B. N. S. 246;] and *Wilson v. Brett*, 11 M. & W. 113, where it was laid down that an unpaid agent is bound to use *such skill as he is shown to possess*, and is guilty of culpable negligence if he do not. And Rolfe, B., in that case said, that there is no difference between negligence and *gross negligence*, that it is the same thing with the addition of a vituperative epithet. Also, in *Austin v. Manchester, &c., Railway Co.*, 10 C. B. 454, it was said, the phrase *gross negligence* is "more correctly used in describing the sort of negligence for which a gratuitous bailee is responsible." See *Pothier Contrat de dépôt*, cap. 2, art. 1, s. 72. ["There is a certain degree of negligence," said Pollock, C.B., in *Beal v. The S. Devon Rail. Co.*, 5 H. & N. 881, "to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them." The distinction may be between simple negligence, and negligence in spite of the better skill or knowledge which the bailee actually had, or undertook to have. "In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence includes the want of that reasonable care, skill, and expedition, which may properly be expected from persons so holding themselves out and their servants. The authorities are numerous, and the language of the judgments] various, but for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requi-

site in the business for which he receives payment. The company therefore" (which sought to limit its liability to cases of gross negligence and fraud), "properly speaking, exclude their liability as insurers, and not their liability for a want of reasonable care, skill, and expedition. This is well illustrated by the case of actions against attorneys, where the law only attaches liability in the case of gross negligence, which a jury has always been supposed competent to deal with under the direction of a judge; and it seems to us that the degree of negligence which the law points out as that which is necessary to make a professional paid agent liable, is not an unreasonable criterion of the reasonableness of the limit to which the carrier seeks to restrict his liability." *Beal v. S. Devon Rail. Co.*, 3 H. & C. 336.]

The case of *Coggs v. Bernard* derives most of its celebrity from the elaborate dissertation upon the general law of *Bailments* delivered by Lord Holt in pronouncing judgment. His lordship, as we have seen, distributes all *Bailments* into the following six classes, *viz.* :—

1. *Depositum*; or a naked bailment of goods, to be kept for the use of the bailor.
2. *Commodatum*. Where goods or chattels that are useful are lent to the bailee *gratis*, to be used by him.
3. *Locatio rei*. Where goods are lent to the bailee, to be used by him for *hire*.
4. *Vadium*. Pawn.
5. *Locatio operis faciendi*. Where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.
6. *Mandatum*. A delivery of goods to somebody, who is to carry them, or do something about them, *gratis*.

Sir William Jones, in his *Treatise on Bailments*, objects to this division; "for," says he, "in truth his *fifth* sort is no more than a branch of the *third*, and he might with equal reason have added a *seventh*, since the *fifth* is capable of another subdivision." The *fifth* of the classes enumerated by Lord Holt is, as we have seen, *Locatio operis faciendi*, i. e. *where goods are delivered to be carried, or something is to be done about them, for reward to be paid to the bailee*. And this, with due submission to so great an authority as Sir William Jones, cannot be reasonably treated as a branch of the *third*, which is *Locatio rei*, i. e. *where goods are lent to the bailee, to be used by him for hire*; for there exists between them this essential difference, *viz.* that in cases falling under the *third class*, or *locatio rei*, the reward is paid by the bailee to the bailor; whereas in cases falling under the *fifth class*, or *locatio operis faciendi*, the reward is always paid by the bailor to the

bailee. It is true that in Latin both classes are described by the word *locatio*, which probably gave rise to Sir William Jones's opinion that both ought to be included under the same head; but then in the *third class*, *locatio rei*, the word *locatio* is used to describe a mode of bailment, *viz.* by the *hiring of the thing bailed*; whereas in the *fifth class*, *locatio operis faciendi*, the same word *locatio* is used, not to describe any mode of bailment, but to signify the *hiring of the man's labour who is to work upon the thing bailed*; for as to the thing bailed, that is not hired at all, as it is in cases falling within the third class. If, indeed, Lord Holt had been enumerating the different sorts of *hirings*, not of *bailments*, he would no doubt, like the civilians, have classified both *locatio rei* and *locatio operis* under the word *hiring*, since in one case goods are hired, and in the other labour. But he was making a classification, not of *hirings*, but of *bailments*; and since in cases of *locatio rei* there is a hiring of the thing bailed, and in cases of *locatio operis* no hiring of the thing bailed, it was impossible to place, with any degree of propriety, two sorts of bailment under the same class, one of which *is*, and the other of which *is not*, a bailment by way of hiring. As to the objection that Lord Holt's *fifth class* of bailments is capable of another subdivision, there is no

doubt but that it may be split, not only as Sir W. Jones suggests, into *locatio operis faciendi*, where work is to be done upon the goods, and *locatio operis mercium vehendarum*, where they are to be carried, but into as many different subdivisions as there are different modes of employing labour upon goods; and, in point of fact, the civilians, in their division of hirings, enumerated another class, *viz.* *locatio custodiæ*, or the hiring of care to be bestowed in guarding a thing bailed, which is omitted by Sir W. Jones. For these reasons, it is submitted that Lord Holt's classification is the correct one, and it remains to make a few remarks on each of the six classes enumerated by him.

1st. With respect to *Depositum*, which it will be recollected is a bailment without reward, in order that the bailee may keep the goods for the bailor, the law respecting the bailee's responsibility may be summed up in the words in which Lord Holt concludes his observations on that head of bailment, *viz.* "if the bailee be guilty of *gross negligence*, he will be chargeable, but not for any ordinary neglect." An important modern case respecting *deposit* has been already cited in this note, *viz.* *Doorman v. Jenkins*, 2 A. & E. 256, where, as has been stated, the question whether there had been *gross negligence* was left to the jury. There are some expressions in this part of Lord Holt's

judgment, from which a superficial reader might infer that his lordship thought that a depositary would always be secure, provided that he kept the goods deposited with as much care as his own; but, on looking attentively at the whole context, it appears that his lordship considered the bailee's keeping the goods bailed as he keeps his own, rather as an argument against the supposition that *gross negligence* has been committed, than as any substantive ground of discharge. "The keeping them," says his lordship, "as he kept his own, is an *argument* of his honesty;" and consequently an *argument* against the supposition of *gross negligence*, for Lord Holt considered *gross negligence* almost the same thing with dishonesty. "If," says he, "there be such *gross neglect*, it is looked upon as *evidence of fraud*." And it is quite clear, especially from *Doorman v. Jenkins*, that *gross negligence* may be committed by a depositary, although he may have kept the property entrusted to him with as much care as his own; and that if it be, his negligence of his own goods is no defence. See also *Rooth v. Wilson*, 1 B. & A. 61. On the other hand, it is also clear that a depositary is not liable for anything short of *gross negligence*; and though Lord Coke in *Southcote's case*, 4 Rep. 83, b., 1 Inst. 89, a. b., expressed an opinion that a depositary is responsible if the goods are stolen from him, *unless*

he accepts them specially to keep as his own, that doctrine has been completely overthrown by Lord Holt in the principal case. How far a depositary may add to his responsibility by inserting special terms in his promise to his bailor, is a point not by any means clearly settled. See *Kettle v. Bromsall*, Willes, 118, and the observations of Sir William Jones on *Southcote's case*; Jones on Bailments, 42, 3; and of Mr. J. Powell in the principal case.

A depositary has no right to use the thing entrusted to him. Bac. Ab. *Bailment, D.*; *Clark v. Gilbert*, 2 Bing. N. C. 343. Where a man finds goods belonging to another, he seems bound, after he has taken them into his possession, to the same degree of care with a depositary. See *Isaac v. Clarke*, 2 Bulst. 306, 312; 1 Rolle, [59, 126]; Doct. & St. Di. 2, c. 38; *sed vide* Bac. Abr. *Bailment, D.*; [and see 27 Hen. 8, fol. 13, pl. 35. He is guilty of larceny if he appropriates the goods to his own use, having intended so to do when he took possession of them, and having then known, or had reasonable grounds for believing that the owner could be discovered. See the cases cited in *R. v. Christopher*, 28 L. J. M. C. 34; and *R. v. Moore*, 30 L. J. M. C. 77. The vendor of goods sold upon credit and left in his custody for the buyer's purposes is liable in trover if he sells and delivers the goods before expiration of the

credit, *Chinery v. Viall*, 5 H. & N. 288; see also *Johnson v. Stear*, 15 C. B. N. S. 331; 33 L. J. C. P. 130, S. C.; and *Lancashire, &c., Co. v. Fitzhugh*, 6 H. & N. 502].

2ndly. As to *Commodatum* or *loan* the responsibility of the bailee is much more strictly enforced in this class of bailments; and that with justice, for the *loan* to him is for his own advantage,—not, as in the case of deposit, for that of the bailor. Besides he may justly be considered as representing himself to the bailor to be a person of competent skill to take care of the thing lent. See *Wilson v. Brett*, 11 M. & W. 115, *per* Parke, B. He is, therefore, bound to use great diligence in the protection of the thing bailed, and will be responsible even for *slight negligence*; nor must he on any account deviate from the conditions of the loan, as in *Bringloe v. Morrice*, 1 Mod. 210, 3 Salk. 271, where the loan of a horse to the defendant to ride was held not to warrant him in allowing his servants to do so. But where a horse was for sale, and the agent of the vendor let A. have the horse for the purpose of trying it, A. was held justified in putting a competent person upon the horse to try it, an authority to do so being implied. *Lord Camoys v. Scurr*, 9 Car. & P. 383.

3rdly. *Locatio rei*. This, as we have seen, is where goods are lent to the bailee *for hire*. In such case, Lord Holt tells us that the

bailee is bound to use *the utmost care*. This expression, as Sir W. Jones has remarked, appears too strong, for it would place a hirer who pays for the use of the goods on the same footing as a borrower; and indeed Lord Holt himself qualifies it, by citing, immediately after, a passage of Bracton, in which the care required is described to be “*talis qualis diligentissimus paterfamilias suis rebus adhibet*.” Sir William has, in an able criticism upon this passage, shown that it was copied verbatim from Justinian, in whose work he further proves, that it must have been used to signify, not *extreme*, but *ordinary* diligence. Accordingly, in *Dean v. Keate*, 3 Camp. 4, the diligence required from the hirer of a horse was such as a prudent man would have exercised towards his own, and therefore, having himself prescribed to it, instead of calling in a veterinary surgeon, he was held responsible. See the notes to that case, and *Davy v. Chamberlain*, 4 Esp. 229; see also *Reading v. Menham*, 1 M. & Rob. 234; and *Longman v. Galini*, Abbott on Shipp. [320, n., 9th Ed.] This species of bailment is determined by a wrongful sale of the goods, and the owner may at once maintain an action of trover against even a *bond fide* purchaser, *Cooper v. Willomatt*, 1 C. B. 672; [and see *Fenn v. Bittlestone*, 7 Exch. 152].

4thly. *Vadium* or *pawn*. In this case also the pawnee is bound

to use *ordinary diligence* in the care and safeguard of the pawn, but he is not bound to use more; and therefore, if it be lost notwithstanding such diligence, he shall still resort to the pawnor for his debt. See Lord Holt's judgment in the text; *Vere v. Smith*, 1 Vent. 121; *Anon.* 2 Salk. 522; [*Syred v. Carruthers*, E. B. & E. 469]. So, too, if several things be pledged for the same debt, and one be lost without default in the pawnee, the residue are liable to the whole debt. *Ratcliffe v. Davies*, Yel. 178; Bac. Abr. *Bailment*, B. If the pawnor make default in payment at the stipulated time, the pawnee has a right to sell the pledge, and this he may do of his own accord, without any previous application to a court of equity. See *Pothonier v. Dawson*, Holt, 385; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 9 Mod. 278; 3 Atk. 303; [per curiam, in *Pigot v. Chubley*, 15 C. B. N. S. 701; and the observations of Williams, J., and Willes, J., in *Martin v. Read*, 11 C. B. N. S. 730; S. C., 31 L. J. C. P. 126]; or he may sue the pawnor for his debt, retaining the pawn, for it is a mere collateral security. Bac. Abr. *Bailm. B.*; *Anon.* 12 Mod. 564. [And it has been said that if there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold. Story on Bailments, 6th Ed., s. 309, p. 281, citing 2 Kent, Comm., pp. 581, 582 (10th Ed., 805, 806). It seems that, according to the civil law, in cases where the time of payment was fixed, an express agreement for the sale (or distress) of the pawn on default was not necessary to entitle the pawnee to sell immediately on default. *Macheldeii Systema Juris Romani*, lib. 1, cap. 6, s. 317, p. 325; and the authorities there cited; *Warnkenig Comm.*, vol. 1, p. 516; and *Œuvres de Pothier*, par Bugnet, vol. 5, 392; vol. 9, 484.] If he think proper to sell, the surplus of the produce, after satisfying the debt, belongs to the pawnor; while, on the other hand, if the pawn sell for less than the amount of the debt, the deficiency continues chargeable on the pawnor. *South Sea Co. v. Duncombe*, 2 Str. 919. From all this it will be seen that a *pawn* differs, on the one hand, from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied; [see *Thames Ironworks Co. v. Patent Derrick Co.*, 1 Johns. & H. 93; 6 Jur. N. S. 1013; 29 L. J. Ch. 714]; and on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee con-

ditionally, so that when the condition is broken the property remains absolutely in the mortgagee; whereas a *pawn* never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it. Com. Dig. *Mortgage, B.*; *Walter v. Smith*, 5 B. & A. 439; *Kemp v. Westbrook*, 1 Ves. 278; *Demandray v. Metcalfe*, Prec. Cha. 420; 2 Vern. 691; *Vanderzee v. Willis*, 3 Bro. 21; *Ratliffe v. Davies*, Yelv. 178; [*R. v. Morrison*, 28 L. J. M. C. 210; *Mau-gham v. Sharpe*, 17 C. B. N. S. 443; 34 L. J. C. P. 19]. There is a passage in the judgment of the Court of Common Pleas in *Clarke v. Gilbert*, 2 Bing. N. C. 356, which, at first sight, seems opposed to the doctrine above laid down as to the sale of a pledge, but which, on consideration of the nature of the article pledged in that case, will be found quite consistent with the proposition that the simple pledge of a mere chattel gives a right of sale on default. In that case a lease had been pledged to a solicitor for the amount of his bill of costs. The

client became bankrupt, and the solicitor, with the concurrence of the assignees, sold the lease, and received his bill of costs out of the proceeds. The commission was superseded for default of the petitioning creditor's debt, and a fresh commission issued, under which the plaintiffs were appointed assignees. They were held entitled to recover against the solicitor the amounts which he had received. Tindal, C. J., in delivering judgment said, "It appears that they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now that lease at the time of such sale was in the possession of the defendant, as a pledge or security for the payment of his demand against the bankrupt, being either in his possession as solicitor, under a claim upon it for his lien which the law gives him, or having been expressly deposited with him as a security for his demand according to the evidence of Stevens. *In either case the right and power of the defendant over the lease was precisely the same*; he had the right to retain the lease in his possession until his demand was paid, and so far by means of the possession of the lease to enforce payment of his demand, but he had that right only; he had no right to sell the lease and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee

could retake it without either payment of the demand or a tender and refusal, which is equivalent to payment. But if instead of keeping the thing pledged he sells it, or enables any other person to sell it by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease in an action of trover." It is conceived that the above passage is not to be considered as propounding generally that a chattel pledged cannot be sold in default of payment, and that it must be confined to the case under discussion, of a pledge of a lease or other title deed which gives the pledgee an equitable mortgage upon the land with a certain known legal remedy by sale under the decree of a Court of Equity, a remedy inconsistent with his parting with the possession of the deed only, for which, without the land, but little could be obtained, whilst great damage could be inflicted on the pledgor by putting his title deed in peril. After the debt has been discharged or tendered, it of course becomes the pawnee's duty to return the pawn. See *the text*: *Isaac v. Clarke*, 2 Bulst. 306; *Anon.* 2 Salk. 522; B. N. P. 72. And if the pawnor have, as he may do, assigned his property in the pledge, subject to the pawnee's rights and special property, the assignee will have, it is said, the same right as the pawnor, both in law and equity; *Kemp v. Westbrook*, 1 Ves. 278;

Franklin v. Neate, 13 M. & W. 481; whereas it is clear that the assignee of the equity of redemption in a thing mortgaged could have no rights *at law*. A mere pledge of chattels personal is therefore not, properly speaking, a mortgage, and though in writing, need not bear a mortgage stamp. *Harris v. Birch*, 9 M. & W. 592. There *may*, however, be a *mortgage*, properly speaking, of chattels, which will be subject to the same incidents as any other mortgage. If the pawnee, after payment or tender, insist upon retaining the goods pledged, he is a wrong-doer, and becomes liable to an action, and chargeable with any damage which may afterwards happen to the pledge, whether with or without his default. See *the text*, Lord Holt's judgment: *Anon.* 2 Salk. 522; Com. D. *Mortg. B.* It is competent for a pawnee to set up the right of a third person to the thing pledged, subject of course to the burthen of proof. *Cheeseman v. Exall*, 6 Exch. 341.

A *pawn* being a sort of bailment, transfer of the possession of the chattel pledged is of the essence of it; and if the pawnee part with the possession, he loses the benefit of his security. *Ryal v. Rolle*, 1 Atk. 164; approved of in *Reeves v. Capper*, 5 Bing. N. C. 140, 141; [but see *Donald v. Suckling*, 7th July, 1866, Q. B.] But if the pawnee, after the pawn has taken place, redeliver the chattel to the pawnor for some purpose con-

sistent with the continuance of the contract of pledge, the possession of it by the pawnor is looked upon as the possession of the pawnee, and the security remains. *Reeves v. Capper*; [and *Martin v. Read*, 11 C. B. N. S. 730, where the goods were left on the pawnor's premises]. A mortgage of a personal chattel may be made without deed. *Flory v. Denny*, 7 Exch. 581. [As to the effect of a mortgage of a ship, see *Kitchen v. Irvine*, 28 L. J. Q. B. 46; and as to damages for the conversion of a pawn, *Johnson v. Stear*, 15 C. B. N. S. 331.]

See, on the subject of pawnbrokers, st. 39 & 40 G. 3, c. 99, 28th July, 1800, intituled "An Act for better regulating the Business of Pawnbrokers," amended as to the hours of business by 9 & 10 Vict. c. 98 [and as to the persons to be deemed pawnbrokers, by 19 & 20 Vict. c. 27]; and see *Nickisson v. Trotter*, 3 M. & W. 130. This act limits the interest which pawnbrokers may take upon loans not exceeding ten pounds, leaving loans of larger amount subject to the ordinary law, see *Pennell v. Attenborough*, 4 Q. B. 868, and contains provisions guarding against the facility of putting away stolen goods through pawnbrokers. At the expiration of a year and a day the pledges may be sold, by public auction only, unless the pawnor give a notice to the contrary, in which case the sale must be postponed

for three months; but if the pawnbroker neglect to sell, the pawnor will, as at common law, have a right to redeem at any time. *Waller v. Smith*, 5 B. & A. 439. [By the 24th section of the act, justices are empowered to award satisfaction to the pawnor if the pledges have been embezzled, lost, or damaged through the pawnbroker's default, neglect, or wilful misbehaviour. In a case where the goods were stolen in a burglary on the pawnbroker's premises, it was considered that he had been guilty of neglect in leaving the premises without any one in them for twenty-four hours, *Syred v. Carruthers*, E. B. & E. 469. The pawnbroker is not liable for damage to the goods by a fire on his premises, unless it be proved that the fire took place through his default, neglect, or wilful misbehaviour, *Shackell v. West*, 4 B. & S. 326; S. C. 29 L. J. M. C. 45. A duplicate is a subject of larceny, *R. v. Morrison*, 28 L. J. M. C. 210.]

5thly. Locatio operis faciendi. In this case, goods are entrusted by the bailor to the bailee, to be safely kept, or to be carried, or to have some work done upon them, for hire to be paid to the bailee. Such is the bailment of goods to a warehouseman or wharfinger to be taken care of, or cloth to a tailor to be made into a garment, of jewels to a goldsmith to be set, of a seal to a stone-cutter to be engraved, &c. In such cases the rule

is, that the bailee is bound not only to perform his contract with regard to the work to be done, but also to use *ordinary* diligence in the care and preservation of the property entrusted to him. *Vide Best v. Yate*, 1 Vent. 268. Thus, if a watch be left with a watchmaker for repairs, he must use *ordinary* care about its safeguard. If he use less, and the watch be lost, he is chargeable with its value. *Clarke v. Ermslaw*, 1 Gow. 30. So a wharfinger who takes upon him the mooring and stationing of the vessels at his wharf is liable for any accident occasioned by his negligent mooring. *Wood v. Curling*, 15 M. & W. 626; 16 M. & W. 628. So if cattle be agisted, and the agister leave the gates of his field open, he uses less than *ordinary* diligence; and if the cattle stray out and are stolen, he must make good the loss. *Broadwater v. Blot*, 1 Holt, 541; [*per* Byles, J., *Marfell v. S. Wales Rail. Co.*, 8 C. B. N. S. 525]. If an uncommon or unexpected danger arise, he must use efforts proportioned to the emergency to ward it off. In *Leck v. Maestaer*, 1 Camp. 138, the defendant was the proprietor of a dry dock, the gates of which were burst open by an uncommonly high tide, and the plaintiff's ship, which was lying there, forced against another ship and injured. It was sworn, that with a sufficient number of hands the gates might have been shored up in time so as to bear

the pressure of the water; and, though the defendant offered to prove that they were in a perfectly sound state, Lord Ellenborough held that it was his duty to have had a sufficient number of men in the dock to take measures of precaution when the danger was approaching, and that he was clearly answerable for the effects of the deficiency. So a warehouseman, who is a bailee of this description, does not use ordinary diligence about the goods entrusted to him, if he have not his tackle in proper order to crane them into the warehouse, whereby they fall and are injured. *Thomas v. Day*, 4 Esp. 262. But he is not liable for loss by a mere accident, not resulting from his negligence. *Garside v. Trent Nav. Co.*, 4 T. R. 581; see *Hyde v. D.*, 5 T. R. 389; *In re Webb*, 8 Taunt. 443; *Vere v. Smith*, 1 Vent. 121. Yet, in case of a loss, the onus is on the bailee to prove that it occurred through no want of ordinary care on his part. *Mackenzie v. Cox*, 9 Car. & P. 632; [*Reeve v. Palmer*, 5 C. B. N. S. 84, where an attorney was held liable in detinue for losing his client's deed, it not being shown how the loss occurred.] There are, however, two cases in which the liability of bailees falling within this class is extended very much beyond the limit above pointed out, *viz.*, where the bailee is an *innkeeper* or a *common carrier*. The extent of the innkeeper's liability

has already been discussed in the notes to *Calye's Case*, the leading authority on that subject. A few words shall be now devoted to that of the carrier.

A *common carrier* is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. Such is a proprietor of waggons, barges, lighters, merchant-ships,¹ or other instruments for the public conveyance of goods. See the text: *Forward v. Pittard*, 1 T. R. 27; *Mors v. Slue*, 2 Lev. 69; 1 Vent. 190, 238, commented on in the text by Lord Holt; *Rich v. Kneeland*, Cro. Jac. 330; *Maving v. Todd*, 1 Stark. 72; *Brook v. Pickwick*, 1 Bing. 218; *Ingate v. Christie*, 3 Car. & K. 61; though one of the termini be beyond the seas, *Bennett v. Peninsular and Oriental Company*, 6 C. B. 775; *Crouch v. London and North Western Rail. Co.*, 14 C. B. 255; [*Pinciani v. The London and S. W. Rail. Co.*, 18 C. B. 226.]

✧ A person who conveys passengers only is not a common carrier. *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79; *Sharpe v. Grey*, 9 Bing. 460; [and *Blake v. G. W. Rail. Co.*, 7 H. & N. 987; S. C., 31 L. J. Exch. 346]. (But see *Brotherton v. Wood*, 3 B. & B. 54, and *Carpue v. London and Brighton Rail. Co.*, 5 Q. B. 747.) As to the liability of a cab proprietor for passenger's luggage, see *Ross v. Hill*, 2 C. B. 877; [*Powles v. Hider*, 6 E. & B. 207].

As to the liability of a railway company to a servant whose fare has been paid by his master, see *Marshall v. The York, Newcastle, and Berwick Rail. Co.*, 11 C. B. 655; [their non-liability to a master for loss of service of servant by injury to the latter while a passenger, upon a ticket taken by himself, *Alton v. Midland Rail. Co.*, 19 C. B. N. S. 213; S. C., 34 L. J. C. P. 292;] for luggage other than the personal luggage of the passenger, and not packed so as to make its nature obvious, *Great Northern Rail. Co. v. Shepherd*, 8 Exch. 30; [*Mytton v. Midland Rail. Co.*, 4 H. & N. 615; *Cahill v. The London and N. W. Rail. Co.*, 10 C. B. N. S. 154; S. C. affirmed in error, 13 C. B. N. S. 818; and *Phelps or Philips v. London and N. W. Rail. Co.*, 19 C. B. N. S. 321; S. C., 34 L. J. C. P. 259;] for luggage accompanying the person of a passenger, and lost in the course of being put into a hackney carriage at the station of arrival, *Richards v. London and South Coast Rail. Co.*, 7 C. B. 839; *Butcher v. South Western Rail. Co.*, 16 C. B. 13; [*Midland Rail. Co. app.*, *Bromley resp.*, 17 C. B. 372; and *Stewart v. The London and North Western Rail. Co.*, 3 H. & C. 135; S. C., 33 L. J. Exch. 199; and for luggage of a passenger placed in the carriage in which he is about to travel, *Le Couteur v. The London and S. W. Rail. Co.*, 35 L. J. Q. B. 40.] A railway company, bound by statute

to carry passengers' wearing apparel without extra charge, was held liable for refusing to carry a bundle of the plaintiff's clothing otherwise than at his risk, and in the carriage in which he travelled. *Munster v. South Eastern Rail. Co.*, 4 C. B. N. S. 676]. A town carman, who does not ply from one fixed terminus to another, but undertakes casual jobs is not, [a common carrier,] *Brind v. Dale*, 2 M. & Rob. 80. A railway company are common carriers, unless exempt by some special provision. *Palmer v. Grand Junction Canal Co.*, 4 M. & W. 749; *Pickford v. Grand Junction Rail. Co.*, 10 M. & W. 399; *Parker v. Great Western Rail. Co.*, 7 Scott, N. R. 835. That is to say, of goods which they [are specially bound by statute to carry, or] profess to carry, or actually carry for persons generally, but not of goods which they have not professed to carry, and are not in the habit of carrying, or only carry under special circumstances, or subject to express stipulations, limiting their liability in respect of them. *Johnson v. Midland Rail. Co.*, 4 Exch. 367; 6 Railway C. 61; *York, Newcastle, and Berwick Rail. Co. v. Crisp*, 14 C. B. 527; *Crouch v. London and North Western Rail. Co.*, 14 C. B. 255; *Hughes v. Great Western Rail. Co.*, 14 C. B. 637; *Slim v. Great Northern Rail. Co.*, 14 C. B. 647; [*Aldridge v. Great Western Rail. Co.*, 15 C. B. N. S., 582; *Harrison v. London, Brigh-*

ton, and South Coast Rail. Co., 2 B. & S. 122; 29 L. J. Q. B. 209; *Thornhill v. The London and Brighton Rail. Co.*, Q. B. 7 May, 1862; *Stewart v. London and North Eastern Rail. Co.*, 14 C. B. N. S. 641, a case of an excursion train; and *Stewart v. London and North Western Rail. Co.*, 3 H. & C. 135]. Questions involving the liability of railway [or canal] companies as carriers of goods, must, however, now be considered in connection with the act of 17 & 18 Vict. c. 31, stated in a subsequent part of this note.

The extraordinary liabilities of a carrier were imposed upon him in consequence of the public nature of his employment, which rendered his good conduct a matter of importance to the whole community. He is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying, [and does not profess to convey.] *Jackson v. Rogers*, 2 Show. 327; *Riley v. Horne*, 5 Bing. 217; *Lane v. Cotton*, 1 Lord Ray. 646; *Edwards v. Sherrutt*, 1 East, 604; *Batson v. Donovan*, 1 B. & A. 32; [*Johnson v. Midland Rail. Co.*, *suprà*, per Parke, B.]. And in a declaration against him for refusing to carry, it is enough to aver readiness and willingness to pay the hire without a formal

tender, *Pickford v. Grand Junction Rail. Co.*, 8 M. & W. 373; *Wylde v. Pickford*, 8 M. & W. 443. The hire charged must be no more than a reasonable remuneration to the carrier, [though at common law there is no liability to carry at equal rates for all customers; *Baxendale v. Eastern Counties Rail. Co.*, 4 C. B. N. S. 63, 78, 83; better reported in 27 L. J. C. P. 145, where it is pointed out that charging less to one than another, is evidence, though not conclusive, that the greater charge is unreasonable]; *Pickford v. Grand Junction Rail. Co.*, 10 M. & W. 399; *Parker v. Great Western Rail. Co.*, 7 Scott, N. R. 835; *Parker v. Bristol and Exeter Rail. Co.*, 6 Exch. 702; *Crouch v. Great Northern Rail. Co.*, 9 Exch. 556; *Parker v. Great Western Rail. Co.*, 11 C. B. 545; *Edwards v. Great Western Rail. Co.*, 11 C. B. 588; [*Crouch v. Great Northern Rail. Co.*, 11 Exch. 742; *Piddington v. South Eastern Counties Rail. Co.*, 5 C. B. N. S. 111; *Parker v. Great Western Rail. Co.*, 6 E. & B. 77; *Baxendale v. Eastern Counties Rail. Co.*, 4 C. B. N. S. 63; and by 17 & 18 Vict. c. 31, ss. 2, 3, and 6, the Court of Common Pleas, or any judge of that court, may by injunction restrain any railway or canal company from giving undue or unreasonable preference to any particular person or description of traffic. See *In re Caterham Rail. Co.*, 1 C. B. N. S. 410; *Oxlade v. North*

Eastern Rail. Co., 1 C. B. N. S. 454; *In re Ransome*, 1 C. B. N. S. 437; *In re Same*, 4 C. B. N. S. 135; *In re Harris*, 3 C. B. N. S. 690; *In re Baxendale*, 4 C. B. N. S. 63; *In re Same*, 5 C. B. N. S. 309, 336; *In re Same*, 11 C. B. N. S. 787; *In re Same*, 12 C. B. N. S. 758; *Same v. The Great Western Rail. Co.*, 16 C. B. N. S. 137; 33 L. J. C. P. 197, S. C.; *Same v. South Western Rail. Co.*, 35 L. J. Exch. 108; *In re Cooper*, 4 C. B. N. S. 738; *In re Garton*, 5 C. B. N. S. 669; *In re Same*, 6 C. B. N. S. 639, and *In re Oxlade*, 15 C. B. N. S. 680.]. As a general rule, "if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is," *per* Parke, B., *Walker v. Jackson*, 10 M. & W. 169, where it was held that the uncommunicated fact, that a carriage contained valuable jewellery and watches, did not exonerate the owners of a ferry over which it was carried from liability for a loss, which was alleged to have been partly occasioned by the weight. [But a railway company is not liable for the loss of merchandise delivered to them by a passenger as his personal luggage to be carried free, without notice that the parcel contains merchandise, *Cahill v. The London*

and *North Western Rail. Co.*, 10 C. B. N. S. 154; affirmed in error, 13 C. B. N. S. 818; *Belfast and Ballymena Rail. Co. v. Keys*, 9 H. of L. C. 556.] In *Crouch v. London and North Western Rail. Co.*, 7 Exch. 705; *Same v. Same*, 14 C. B. 255, 7 Rail. C. 717, it was considered that a carrier has no general right to refuse to carry a parcel upon the ground of a refusal of information as to its contents, there being nothing to show that such information was necessary. [Where the owner of some salt cake, knowing it to be a substance likely to destroy goods with which it might come into contact, shipped it in bulk on board the defendant's ship, without informing him of its destructive nature, it was held that the defendant was not liable for an injury to the article, caused by its having corroded some casks, near to which it had been stowed. In such cases, the shipper is liable to the shipowner for damage caused by the destructive article, (see *Hutchinson v. Guion*, 5 C. B. N. S. 149; *Brass v. Maitland*, 6 E. & B. 470; *Alston v. Herring*, 11 Exch. 822; *Hearne v. Garton*, 28 L. J. M. C. 16; and s. 329 of the Merchant Shipping Act, 1854); and to the carrier's servant for injury to him, *Tarrant v. Barnes*, 11 C. B. N. S. 553; S. C., 31 L. J. C. P. 137.] While the goods are in [the carrier's] custody, he is bound to the utmost care of them; and, unlike other bailees

falling under the same class, he is, at common law, responsible for every injury sustained by them occasioned by any means whatever, except only the act of God, or the King's enemies, 1 Inst. 89; *Dale v. Hall*, 1 Wils. 281; *Covington v. Willan*, Gow, 115; see *Davies v. Garrett*, 6 Bing. 716; *Bourne v. Gattliffe*, 8 Scott, N. R. 604; 11 Cl. & Fin. 45; [*Bristol and Exeter Rail. Co. v. Collins*, 7 H. of Lords C. 194, 29 L. J. Exch. 41; *Oakley v. Portsmouth, &c., Co.*, 11 Exch. 618; *Briddon v. Great Northern Rail. Co.*, 28 L. J. Exch. 51.]

However, when the increase of personal property throughout the kingdom, and the frequency with which articles of great value and small bulk were transmitted from one place to another, had begun to render this degree of liability intolerably dangerous, carriers, on their part, began to insist that their employers should, in such cases, either diminish it, by entering into special contracts to that effect upon depositing their goods for conveyance, or should pay a rate of remuneration proportionable to the risk undertaken. To this end, they posted up and distributed written or printed notices, to the effect that they would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. If this notice was not communicated to the employer, it was of course

ineffectual, *Kerr v. Willan*, 6 M. & S. 150. (See, as to a by-law not communicated, *Great Western Rail. Co. v. Goodman*, 12 C. B. 313.) But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by its contents, *Mayhew v. Eames*, 6 B. & C. 601; *Rowley v. Horne*, 2 Bing. 2; *Nicholson v. Willan*, 5 East, 507; [as to evidence of knowledge of and assent to the terms of a notice, see *Van Toll v. South Eastern Rail. Co.*, 12 C. B. N. S. 75; S. C., 31 L. J. C. P. 241]. Still the carrier, notwithstanding his protection by the notice, was bound to avoid gross negligence; and if the property was lost or injured by such negligence, he was responsible, *Smith v. Horne*, 2 B. M. 18; *Duff v. Budd*, 3 B. & B. 177; *Birkett v. Willan*, 2 B. & A. 356; *Garnett v. Willan*, 5 B. & A. 53; *Sleat v. Fagg*, Ib. 542; *Wright v. Snell*, Ib. 350; *Wyld v. Pickford*, 8 M. & W. 443; *Butt v. Great Western Rail. Co.*, 11 C. B. 140; *Owen v. Burnett*, 4 Tyrwh. 143; *Hinton v. Dibbin*, 2 Q. B. 646; [*Great Western Rail. Co. v. Rimell*, 18 C. B. 575; and the judgment of Lord Wensleydale, and the opinion of Blackburn, J., in Dom. Proc., in *Peek v. The North Staffordshire Rail. Co.*, 32 L. J. Q. B., 246, 250, 273]. Unless, indeed, the employer had lulled his vigilance by an undue concealment of the nature of the trust

imposed on him, for such conduct would have exonerated the carrier, even had he given no notice, *Batson v. Donovan*, 4 B. & A. 21; *Miles v. Cattle*, 6 Bing. 743; see also 4 Burr. 2301; B. N. P. 71; and as to the mode of pleading such a defence, *Webb v. Page*, 6 Scott, N. R. 951; [S. C., 6 M. & G. 196;] which shows that it cannot be raised under the plea of not guilty.

Very many questions, as was naturally to be expected, having arisen upon the construction of these notices, and whether they had come to the customer's knowledge, the legislature has thought proper to step in, and by several enactments to regulate the responsibility of carriers by land and water. The land-carriers' act is st. 11 Geo. 4 & 1 Will. 4, cap. 68, which enacts that no common carrier by land for hire, shall be liable for loss, [see *Hearn v. London and South Western Rail. Co.*, 10 Exch. 793; *Pinciani v. London and South Western Rail. Co.*, 18 C. B. 226;] or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets, (see [*Bernstein v. Baxendale*, 6 C. B. N. S. 251, overruling] *Davey v. Mason*, 1 Car. & M. 45;) bills, bank-notes, orders, notes, or securities for payment of money, [*Stoessiger v. South Eastern Rail. Co.*, 3 E. & B. 549, acted upon in *McCall v. Taylor*, 19 C. B. N. S. 301; S. C., 34 L. J. C. P. 365;]

stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated article, glass, (see *Owen v. Burnett*, 4 Tyrwh. 143, [*Bernstein v. Baxendale*]); china, silks—manufactured or unmanufactured—wrought up or not wrought up with other materials, (see [*Bernstein v. Baxendale*,] *Brunt v. Midland Rail. Co.*, 2 H. & C. 889; 33 L. J. Exch. 187;) furs (see *Mayhew v. Nelson*, 6 C. & P. 59), or lace, contained in any parcel, [other than machine made lace, “The Carriers’ Act Amendment Act, 1865,” 28 & 29 Vict. c. 94, s. 1,] when the value exceeds the sum of 10*l.*, unless at the time of delivery the value and nature of the article shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel. This act applies to the case of a delivery to the carrier or his servant, whether at his office or elsewhere, *Hart v. Baxendale*, 6 Exch. 769. By sect. 2, the carrier may demand for such parcels an increased rate of charge, which is to be notified by a notice affixed in his office, and customers are to be bound thereby, without further proof of the notice having come to their knowledge. Carriers who omit to affix the notice are, by sect. 3, precluded from the benefit of this act, so far as the right to extra charge is concerned; but it seems that they are, even in that case, entitled to a declaration of the

value and nature of the goods, *Hart v. Baxendale*, 6 Exch. 769; [*Pinciani v. London and South Western Rail. Co.*, 18 C. B. 226;] and, by sect. 4, they can no longer by a public notice limit their responsibility in respect of articles not within the act. Special contracts, however, between the carrier and his employer are still allowed, and are not affected by this statute. And such a contract may be inferred by a jury from the fact of a notice given by the carrier to his customer, and the customer having subsequently sent goods to be carried without objecting to the terms of the notice, *Walkerv. York and North Midland Rail. Co.*, 2 E. & B. 750. See also *Chippendale v. Lancashire and Yorkshire Rail. Co.*, 21 L. J. Q. B. 23, where the carriers were held protected by their special contract, though the carriage was insufficient; [*Van Toll v. South Eastern Rail. Co.*, 12 C. B. N. S. 75; S. C., 31 L. J. C. P. 241, where the receipt and keeping of a ticket for luggage left at a railway station was considered to be evidence of notice of the terms on the back of the ticket; and *Stewart v. London and North Western Rail. Co.*, 3 H. & C. 135; S. C., 33 L. J. Exch. 199.] To the same effect are *Great Northern Rail. Co. v. Morville*, 21 L. J. Q. B. 319; *Austin v. Manchester, &c., Rail. Co.*, 10 C. B. 454; and see *Same v. Same*, 16 Q. B. 600; *Shaw v. York and North Midland Rail. Co.*, 13 Q.

B. 347; *Carr v. Lancashire and Yorkshire Rail. Co.*, 7 Exch. 707; where the injury was collision, and Platt, B., dissented; *Fowles v. Great Western Rail. Co.*, 7 Exch. 969, where the loss was beyond the terminus of the railway; and *Wylde v. Pickford*, 8 M. & W. 443. [The carrier loses the benefit of the act if, after declaration of value, he receives the goods without demanding the extra charge, *Behrens v. Great Northern Rail. Co.*, 6 H. & N. 956; S. C., affirmed in error, 7 H. & N. 950; 31 L. J. Exch. 299. The declaration of value is not part of the contract of carriage, *McCance v. North Western Rail. Co.*, 7 H. & N. 477; S. C., 31 L. J. Exch. 65; (as to cases where the contract is for conveyance by land and water, and the goods are lost by land, see *Le Conteur v. The London and South Western Rail. Co.*, 35 L. J. Q. B. 40).] By sect. 5, the act is not to protect carriers from their liability to answer for loss occasioned by the felonious acts of their own servants, nor is it to protect the servant from answering for his own neglect or misconduct. Every person actually engaged in the performance of the contract of carriage and delivery is a servant of the carrier within the meaning of this section, though not strictly so within the decision in *Quarman v. Burnett*, 6 M. & W. 499, and the long series of cases by which it has been followed, *Martin v. South Western Rail. Co.*, 2 Exch. 415. [The plaintiff,

if he relies upon the felony, must reply it, *Pinciani v. London and South Western Rail. Co.*, *supra*.] It is to be observed that felony of the carrier's servant without gross negligence on the part of the employer, was not a ground of liability in cases within the carrier's notice or special contract, though it is expressly made so in cases within the statute, *Butt v. Great Western Rail. Co.*, 11 C. B. 140; [*Great Western Rail. Co.*, app., *Rimell*, resp., 18 C. B. 575. The case of *Butt v. Great Western Rail. Co.* has been frequently misunderstood. It was not a case within the statute. The plea alleged a non-compliance with the conditions of the notice; the plaintiff new assigned that the loss had been caused by the felony of the defendant's servants; and on special demurrer to this new assignment, the plaintiff was allowed to amend by replying a loss by felony through the gross negligence of the defendant. Mr. Justice Willes is erroneously reported to have said, in *Metcalfe v. The London and Brighton Rail. Co.*, 4 C. B. N. S. 309, 310, that the demurrer in *Butt v. Great Western Rail. Co.* was on the ground "that carriers are not answerable at common law for the felonious acts of their servants," and in S. C. 27 L. J. C. P. 207, that the plea was "an excuse under the Carriers' Act." As to evidence of a felony by the carrier's servants, see *The Great Western Rail. Co.*, app.,

Rimell, resp., *supra*; and *Keys v. Belfast and Ballymena Rail. Co.*, 8 Ir. C. L. R. 167; reversed in Dom. Proc., 9 H. of L. C. 556. A carrier has an insurable interest in goods the value of which has not been declared in accordance with the act, *London and North Western Rail. Co. v. Glyn*, 28 L. J. Q. B. 188.]

It was held in one case that, notwithstanding this statute, the carrier is still answerable for gross negligence on his part, which has occasioned a loss of property such as the act directs to be insured, even although the owner has neglected to insure it; for the protection given to the carrier by the act is substituted for the protection which he formerly derived from his own notice, and the former, therefore, it has been supposed, will not now protect him in a case in which the latter would not have been allowed to do so in consequence of his misconduct, *Owen v. Burnett*, 4 Tyrwh. 142. But the Court of Queen's Bench has decided that, in a case within the carrier's act, the carrier is not liable for a loss by his servant of the articles mentioned in the statute, even though it may have been occasioned by gross negligence not amounting to a misfeasance, *Hinton v. Dibbin*, 2 Q. B. 646, where the subject is discussed in a most elaborate judgment.

The monopoly enjoyed by railway companies led in some cases to their restricting their liability

by special contracts with customers who could not afford the time or expense of litigating the right to refuse to carry except upon the terms of such contracts. This led to the enactment of 17 & 18 Vict. c. 31, "The Railway and Canal Traffic Act, 1854," [extended to traffic carried on by railway companies' steamers, by 26 & 27 Vict. c. 92, s. 31]. That act, by the first six sections, provides for enforcing against railway and canal companies, by means of proceedings in the Court of Common Pleas in England, in any of the superior courts in Ireland, in the Court of Session in Scotland, or before any judge of any such court, at the instance of persons aggrieved, the duty of making arrangements for receiving and forwarding traffic of every description without delay and without partiality. The seventh section enacts, that "every such company as aforesaid shall be liable for the loss of or for any injury [*Allday v. Great Western Rail. Co.*, 5 B. & S. 903; 34 L. J. Q. B. 5] done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, [*Hodgman v. The W. Midland Rail. Co.*, 5 B. & S. 173; 33 L. J. Q. B. 233; affirmed in error, 35 L. J. Q. B. 85,] forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, [*Van Toll v. South Eastern Rail. Co.*, 12 C. B. N. S. 75, and the judgment of Erle, C. J., in *Harrison v. The London*

and Brighton Rail. Co., 2 B. & S. 122; 31 L. J. Q. B. 113, 115; 2 B. & S. 152, in Cam. Scac.] notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: provided always, that nothing herein contained shall be construed to prevent the said companies from making such *conditions* with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable: provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned: (that is to say,) for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall at the time of such delivery, have declared them [*Robinson v. The South Western Rail. Co.*, 19 C. B. N. S. 51; S. C. 34 L. J. C. P. 234]; *McCance v. The North Western Rail. Co.*, 7 H. & N. 477; 3 H. & C. 343; S. C., 31 L. J. Exch. 65] to be respectively of higher value than as above mentioned; in which case it shall be lawful for such com-

pany to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: provided also, that no *special contract* between such company and any other parties respecting the receiving, forwarding [*Van Toll v. South Eastern Rail. Co.*, *supra*], or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said act."

[It was for some time undecided whether, on the one hand, a special contract which had been signed was valid within the meaning of this section, although it might not be just and reasonable, and whether, on the other, a notice or condition which was just and reasonable was valid if not signed. In *Wise v. Great Western Rail. Co.*, 1 H. & N. 63, a special contract which was signed was held to be valid without reference to the question of its reasonableness; see also the judgments of Martin and Bramwell, BB., in *Partridge v. South Wales Rail. Co.*, 1 H. & N. 393; and *Beale v. South Devon Rail. Co.*, 5 H. & N. 875; S. C. in error, 3 H. & C. 337. But in *Simons v. Great Western Rail. Co.*, 18 C.B. 805, a contract was held to be void on the ground of unreasonableness, although it was signed, and in *McManus v. Lancashire, &c., Rail. Co.*, 2 H. & N. 693, a signed special contract was considered to be reasonable, and therefore binding. In *Peek v. North Staffordshire Rail. Co.*, E. B. & E. 958, a condition held to be reasonable was held to be void because it was unsigned (Erle, J., *dissentiente*). The two last-mentioned cases were taken up to the Exchequer Chamber, and in *McManus v. Lancashire, &c., Rail. Co.*, 4 H. & N. 327, the court of error, reversing the judgment of the Exchequer, held (*dissentiente* Erle, J.) that the special contract which the plaintiff had signed was void because it

was unreasonable. — “In effect,” said Mr. Justice Williams, in delivering the judgment of the majority of the court of error, “before the statute every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law.” According to this view the words “special contract” and “conditions,” as used in the act, are synonymous terms; consequently when the case of the *North Staffordshire Rail. Co. v. Peek*, E. B. & E. 986, came at a later period before the Court of Exchequer Chamber, it was considered to be a settled point, that the act does require that conditions should be signed. That was an action against the railway company as common carriers, for negligently carrying three marble chimney-pieces. 4th plea: Special contract, exempting defendants from responsibility for injury to marbles unless insured, and no insurance of the marbles in question. 5th plea: Condition to the same effect, alleging it to be reasonable. Issues thereon: verdict for defendants on both pleas. The plaintiff had had notice of such condition, and in a letter to the defendants had requested them “to forward the three cases of marble not insured,” which they did. On

a special case in the Exchequer Chamber it was held, reversing the decision of the Queen's Bench, that the defendants were entitled to have the verdict entered for them upon the 4th plea, on the ground that the plaintiff's letter, coupled with the forwarding of the goods in pursuance of it, and some other correspondence, constituted a special contract signed within the meaning of the 4th proviso in the 7th section of the act. This decision was in its turn reversed by the House of Lords; the Lord Chancellor (Westbury,) and Lord Wensleydale, holding that, under the act, the validity of conditions limiting the common law liability of the carrier is subject to their being both adjudged just and reasonable, and also embodied in a signed special contract, and in the case before them, the condition was neither the one nor the other; Lord Cranworth agreeing that there was no contract in writing, and that the condition was not just and reasonable; and Lord Chelmsford dissenting "*totis viribus*," but, as to the reasonableness of the condition, on the ground that his lordship thought it was not intended to extend to neglect or default by the company or its servants. Some of the many observations of the Lord Chancellor may be cited here. "I think," he said, "the true construction of the 7th section of the act may be expressed in a few words. I take it to be equivalent to a simple enact-

ment, that no general notice given by a railway company shall be valid in law, for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner, or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person.—The words "of the act" expressly state that any condition, having for its object to relieve a company from liability occasioned by the neglect or default of such company shall be null and void. Now, my lords, if the present condition were embodied in a contract between the company and the owner of the goods delivered to be carried by that company, the necessary effect of such a contract would be, that it would exempt the company from responsibility for injury, however caused; including, therefore, gross negligence, and even fraud or dishonesty on the part of the servants of the company. For the condition is expressed without any limitation or exception." Therefore, his lordship considered the condition unreasonable, and he held that it was not embodied in a special contract in writing, because the

words "not insured" did not refer "to the written condition, or afford any ground upon which the written condition can be regarded as incorporated in the contract." The letter, said Lord Cranworth, "shows that the person sending the goods, chose to send them with the incidents attaching by law to the sending of the marbles uninsured; but it does not show that he agreed to a stipulation by the company that they were to be absolved from responsibility by reason of their being so sent; still less, that he so agreed by reason of their not being insured according to their value. Even if it could be held that there is a well-recognised distinction in the carrying trade between the extent of liability in the carriage of goods where they are insured, and where they are uninsured, it by no means follows that insurance must necessarily be according to the value of the goods." See *Peek v. North Staffordshire Rail. Co.*, 32 L. J. Q. B. 241.

The condition which in *McManus v. Lancashire, &c., Rail. Co.*, was held to be unreasonable, was that "the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon the railway or in their vehicles." The court was of opinion that this condition, if held to be valid, would protect the company from liability in respect of their own gross negligence or miscon-

duct. See *Gregory v. The West Midland Rail. Co.*, 2 H. & C. 944; S. C., 33 L. J. Exch. 155. In *Beale v. South Devon Rail. Co.*, 5 H. & N. 875, affirmed in error, 3 H. & C. 337, and already cited, the company gave notice that they would only convey *fish* on their line by special agreement, and the condition in question provided "that the company should not be responsible under any circumstances for loss of market, or for other loss or injury from any cause whatever, *other than gross negligence or fraud*," and this condition was held to be valid, Martin, B., *dissentiente*. In *Simons v. Great Western Rail. Co.*, *supra*, a condition framed for the purpose of absolving the company from responsibility for the loss or non-delivery of goods by reason of insufficient or improper package was adjudged to be unjust and unreasonable; in the same case a condition was held to be valid because confined to goods carried at the lower of two rates charged by the company (see also *Munster v. South-Eastern Rail. Co.*, 4 C. B. N. S. 676, and *North Staffordshire Rail. Co. v. Peek*, *supra*). In *Harrison v. London, Brighton and South Coast Rail. Co.*, 3 B. & S. 122; 31 L. J. Q. B. 113, overruling in error a decision between the same parties, a condition against liability for loss or damage to horses or dogs above certain values, unless the value was declared, the company only to

be liable for the declared value, and extra charges to be paid according to the value, was held to be reasonable. See also *Robinson v. Great Western Rail. Co.*, 19 C. B. N. S. 51; S. C., 35 L. J. C. P. 123. Conditions protecting the company against claims for loss unless made within seven days from the time at which the goods should have been delivered, and against liability for the loss of goods untruly or incorrectly declared or described by the sender, were held to be binding, in *Lewis v. Great Western Rail. Co.*, 5 H. & N. 867. A condition against liability for delay was adjudged unreasonable in *Allday v. Great Western Rail. Co.*, 5 B. & S. 903; 34 L. J. Q. B. 5; for damage beyond the limits of the company's railway, was held reasonable in *Aldridge v. Great Western Rail. Co.*, 15 C. B. N. S. 582; S. C., 33 L. J. C. P. 161. As to unreasonableness of part of the contract only, voiding that part, see *McCance v. London and North Western Rail. Co.*, 3 H. & C. 343; 31 L. J. Exch. 65. The signature to the special contract may be made by an agent of the party delivering the goods, see the *North Staffordshire Rail. Co. v. Peek*, E. B. & E. 986. The question of reasonableness was argued on demurrer in *Simons v. Great Western Rail. Co.*; it is generally a mixed question of law and fact. A plea setting up a special contract in these cases should, perhaps, allege

that the contract was signed, and is just and reasonable, see *Lewis v. Great Western Rail. Co.*; such an allegation has, however, been repeatedly omitted, and see *post*, the notes to *Birkmyr v. Darnell*.]

With respect to carriers by water, besides the exemptions for which they stipulate in their charter-parties and bills of lading (which latter always contain a clause discharging them from liability for losses occasioned by "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever;" the first two of which exemptions they indeed enjoyed at common law, and that from loss by fire under 26 Geo. 3, c. 86, s. 2, which statute, however, was held to apply only to fire on board the ship, and not to a fire on board a lighter, in which the goods were being taken to the ship, *Morewood v. Pollock*, 1 E. & B. 743), they were further protected by the last-mentioned statute from making good loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, sustained by any robbery, embezzlement, making away or secreting thereof, unless the owner or shipper had, at the time of shipping, declared the nature and value thereof in writing. The 6 Geo. 4, c. 155, s. 53, exempted them from liability from damage arising from the want of a duly qualified pilot, unless incurred

by their own refusal or neglect to take one on board; and sect. 55, from liability for loss incurred through the default or incompetency of a licensed pilot. And now, by 17 & 18 Vict. c. 104, s. 388, "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." See *The Agricola*, 2 W. Robinson, 10; [*Hammond v. Rogers*, 7 Moore, Priv. C. C. 160, 171, *Pollock v. M'Alpin*, 7 Moore, P. C. 427.] Where their common law liability remained, it was from time to time much narrowed by the following acts, viz. 7 Geo. 2, c. 15, which exempted them from making good losses incurred by the misconduct of the master and mariners, without their privity, to a greater extent than the value of the ship and freight (see *Sutton v. Mitchell*, 1 T. R. 18, *Brown v. Wilkinson*, 15 M. & W. 391, [*The African Steam-ship Co. v. Swanzy*, 2 Kay & J. 660; 25 L. J. Cha. 870; *Leycester v. Logan*, 3 Kay & J. 446; 26 L. J. Cha. 306; *Same v. Same*, 4 Kay & J. 725]), 26 Geo. 3, c. 86, sect. 1, which extended the above enactment to all cases of loss by robbery by whomsoever committed, and 53 Geo. 3, c. 159, which extended it to all cases of loss occasioned without their default or privity; but this

act did not extend to vessels used solely in rivers or inland navigations, nor to any ship not duly registered according to law; nor did any of those acts extend to lighters and gabbets; *Hunter v. M'Gown*, 1 Bligh, 573. It should also be observed that the benefit of the three last-mentioned acts extended to owners only, not to masters, and that the last contained an express clause against relieving the master, though he might happen also to be a part-owner. See *Wilson v. Dickson*, 2 B. & A. 2, *Atkinson v. Stevens*, 7 Exch. 567. The general act now in force upon this subject is the 17 & 18 Vict. c. 104, part 9, sects. 502 to 516; [amended by 25 & 26 Vict. c. 63; see sect. 54. As to the declaration of the nature and value required by sect. 503, see *Williams v. African Steam-ship Co.*, 1 H. & N. 300]; and see the Common Law Procedure Act, 18[60, sect. 35. In a modern case a condition in a bill of lading that the shipowner should not be accountable for leakage or breakage was held not to discharge him from liability for gross negligence, *Phillips v. Clark*, 2 C. B. N. S. 156. See also *Wilton v. The Atlantic Royal Mail Co.*, 10 C. B. N. S. 453].

Where goods consigned to a vendee are lost through the default of the carrier, the consignee is the proper person to sue, for the consignor was his agent to retain the carrier, *Daves v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B.

& P. 582; *King v. Meredith*, 2 Camp. 639; *Brown v. Hodgson*, Ib. 36; [*The London and North-Western Rail. Co. v. Bartlett*, 7 H. & N. 400; S. C., 31 L. J. Exch. 92]. But it is otherwise where the goods were sent merely for approval, *Swain v. Shepherd*, 1 M. & Rob. 224; or the consignee is the agent of the consignor, *Sargent v. Morris*, 3 B. & A. 277; or the carrier has contracted to be liable to the consignor in consideration of the latter's becoming responsible for the price of the carriage, *Moore v. Wilson*, 1 T. R. 659; *Davis v. James*, 5 Burr. 2680; or where the property in the goods has not yet passed to the vendee, as, for instance, when there is no evidence of a contract sufficient to satisfy the Statute of Frauds, and the carrier is not of the vendee's selection, *Coates v. Chaplin*, 3 Q. B. 483; *Norman v. Phillips*, 14 M. & W. 277; [*Coombes v. Bristol and Exeter Rail. Co.*, 3 H. & N. 510]; or, to speak generally, where the carrier is employed by the consignor, and the goods are at his risk, *Dunlop v. Lambert*, 6 Cl. & Fin. 600. See *Freeman v. Birch*, 1 Nev. & M. 420; S. C., 3 Q. B. 492, n.

In the case of an action brought against a carrier, it is sufficient *prima facie* evidence of a loss by his negligence to show that the goods never reached the consignee, or a short delivery, *Hawkes v. Smith*, Car. & M. 72, Rolfe, B. But where they are bailed to a

booking-office keeper to be delivered to a carrier, the plaintiff must show by direct evidence, that they were not delivered to one, *Gilbart v. Dale*, 5 A. & E. 543; *Griffith v. Lee*, 1 C. & P. 110; [*Midland Rail. Co. v. Bromley*, 17 C. B. 372]. With regard to the mode of declaring against a carrier, formerly the practice was to set out the custom of the realm; that has been discontinued because the custom of the realm being the law of the realm, the courts take notice of it. Afterwards the practice became to state the defendants to be *common carriers for hire, totidem verbis*; that was however departed from to some extent in *Brotherton v. Wood*, 3 B. & B. 58, and still more in *Pozzi v. Shipton*, 8 A. & E. 974, where a declaration stating that the plaintiff delivered and that the defendant accepted the goods in question, to be carried for reward from A. to B., was held sufficiently upon the custom of the realm to warrant a verdict against one of two defendants, upon evidence of his being a common carrier. The court however doubted whether it would have been good on special demurrer. If to such a declaration the defendant pleads an acceptance of the goods on the special terms of a carrier's notice, the plaintiff, if he means to rely upon *gross negligence* as rendering the defendants liable notwithstanding the notice, must reply or new

assign such negligence, *Wyld v. Pickford*, 8 M. & W. 443; [*Butt v. Great Western Rail. Co.*, 11 C. B. 140. A declaration upon the custom is in substance *in tort*, and therefore the plaintiff is entitled to costs notwithstanding the 19 & 20 Vict. c. 108, s. 30, when he recovers less than 20*l.* on a judgment by default, *Tattan v. Great Western Rail. Co.*, 2 E. & E. 844. See, however, *Kerr v. Midland Great Western Rail. Co.*, 10 Irish C. L. Rep. Appendix XLV. If goods have been carried under a special contract, the declaration ought in general to be upon such contract, and should not allege a receipt by the defendants as common carriers. See *White v. Great Western Rail. Co.*, 2 C. B. N. S. 7, and *Phillips v. Edwards*, 4 H. & N. 813. In *Simons v. Great Western Rail. Co.*, 2 C. B. N. S. 620, the defendants were held liable as common carriers, their servants having taken advantage of the plaintiff, and having induced him by a misrepresentation to sign a special contract.] It is the duty of a carrier not only to carry safely, but also, if no time be stipulated, to carry within a reasonable time, and a breach of that duty may be proved under a declaration alleging the lapse of a reasonable time, and that the carrier has not delivered, *Raphael v. Pickford*, 5 M. & G. 551, 6 Scott, N. R. 478; [*The Great Northern Rail. Co. v. T aylor*, 35 L. J. C. P. 210. He may set up the *jus*

tertii, *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618].

Questions have arisen as to the time during which the liability of the carrier continues, and there is sometimes considerable difficulty in determining the period at which he ceases to hold the goods in his capacity of carrier, though retaining the control or possession of them. It is for the jury (when there is no written contract) to determine the extent of the agreed transit, as, for instance, in the case of goods carried across a ferry, it is for the jury to determine from evidence of the practice at the ferry whether the owners of the ferry have undertaken to carry goods up a slip, or only to land them on the shore. See *Walker v. Jackson*, 10 M. & W. 161. So where goods are delivered at the office of a railway company to be carried from one terminus to another, it may be inferred by the jury that this company is answerable for the whole transit, though in part on the line of another company, *Muschamp v. Lancaster, &c., Rail. Co.*, 8 M. & W. 421; *Watson v. Ambergate, &c., Rail. Co.*, Q. B., 14 May, 1851; *Scothorn v. South Staffordshire Rail. Co.*, 8 Exch. 341; [*Bristol & Exeter Rail. Co. v. Collins*, 7 H. of Lords C. 194; 29 L. J. Exch. 165; *Mytton v. Midland Rail. Co.*, 4 H. & N. 615; *Coxon v. Great Western Rail. Co.*, 5 H. & N. 274; *Birkett v. Whitehaven Junction Rail. Co.*, 4 H. & N. 730; *Wilby v. West Cornwall*

Rail. Co., 2 H. & N. 703; *Webber v. Great Western Rail. Co.*, 3 H. & C. 771; 34 L. J. Exch. 170; and as to passengers, see *Blake v. Great Western Rail. Co.*, 7 H. & N. 987; S. C., 31 L. J. Exch. 349.]

When the goods have arrived at the end of the transit, it seems that the carrier is bound to keep them a reasonable time at his own risk for the owner, and it would seem that during the period for which he keeps them under an obligation to do so, springing out of his receipt of them as a carrier, he is subject to the same liability as during their transit. See *Hyde v. Trent Navigation Company*, 5 T. R. 389. After that period his extraordinary liability as a common carrier is, it would seem, at an end, and he remains liable only to the same extent as ordinary depositees. See per Lord Abinger, C. B., *Cairns v. Robins*, 8 M. & W. 258. Whilst the goods are in the possession of the carrier, he is bound to take proper means for their preservation, and it was even held to be within the scope of the duty of a railway company employed to carry quicks, to plant them, or allow them to be planted in their own land for that purpose. *Taff Vale Railway Co. v. Giles*, 2 E. & B. 823. [If the goods are tendered to the consignee, and he refuses to receive them, it is not, as a matter of law, the duty of the carrier to give the consignor notice of the refusal, but he is bound to do what under the cir-

cumstances may be reasonable. In *Hudson v. Baxendale*, 2 H. & N. 575, the defendants, on the refusal by the consignee to receive a puncheon of gin, which the plaintiff had employed them to carry to him, put it into a warehouse, and left it there for two months, without giving notice to the plaintiff. At the end of this period it was found that a portion of its contents was gone. The jury found that the defendants had acted in a reasonable manner, and gave a verdict in their favour, which verdict was subsequently upheld. In *The Great Western Rail. Co. v. Crouch*, 2 H. & N. 491, (S. C. affirmed in error, 3 H. & N. 183,) the carriers took back a parcel, the very next morning after a refusal to receive it, from Plymouth to London, and they were held to be liable for so doing, the jury having found that the parcel was sent back before the expiration of a reasonable time.]

In *Bourne v. Gatliff*, 4 N. C. 314, 5 Scott, 667, 3 Scott, N. R. 1; 3 M. & G. 643; 8 Scott, N. R. 604; 11 Clark & Fin. 45, the duty of a carrier by sea was much considered. It was there holden by the Courts of Common Pleas and Exchequer Chamber, and by the House of Lords, that in the absence of any course of dealing or usage of the port to justify him, a carrier by sea under a bill of lading of goods to be delivered "at the port of London, (all and

every the dangers of the sea, &c., excepted,) unto Mr. Samuel Gatliff or assigns, on paying for the said goods freight," &c., was not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and that, having so landed them on a wharf where, before coming to the hands of the owner, they were destroyed by accidental fire, the carrier was responsible for their loss. In the same case, upon a plea to the second count, a question arose as to the liability of a carrier by sea, who, for an additional hire, undertakes, after the arrival of the goods, to take care of them at the wharf where they are landed, and to convey them within a reasonable time to the place of business of the customer. The Court of Common Pleas held that he was liable for a loss of the goods by accidental fire whilst on the wharf, there being no ground for supposing him to be clothed with one degree of responsibility whilst taking care of the goods at the wharf, and another and different degree whilst carrying the goods from the wharf, inasmuch as both those duties formed part of the same express contract, and were paid for by the same reward; and that court referred to *Hyde v. Trent Navigation Company* as an authority for their judgment. In the Exchequer Chamber that part of the judgment was reversed on the ground that the second count did not state an employment of

the defendants as common carriers, a point not noticed in the Common Pleas, and the principle acted upon by that court is therefore, perhaps, untouched by the reversal. [A shipowner is, generally speaking, not bound to unload before production of the bill of lading, *Erichsen v. Barkworth*, Cam. Scacc. 3 H. & N. 601.]

In *Cairns v. Robins*, 8 M. & W. 258, goods were sent by a carrier, who delivered them to his customer, accompanied by a printed bill, which stated that "any goods that shall have remained three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, will be sold to defray the carriage and other charges thereon, or the general lien, as the case may be, together with warehouse-rent and expenses." The customer sent them back to the carrier's warehouse to await his orders. They remained there more than a year, and then were lost. The customer brought an action treating the carriers as bailees for reward, and a verdict found for the plaintiff was upheld by the Court of Exchequer on the ground stated by Alderson, B., in the course of his judgment, that there was evidence from whence the jury might reasonably find, that in consideration that the parties whose goods were carried would pay a certain sum, the defendants would not only carry them, but would warehouse them for three

months, the compensation so paid being a compensation not only for carrying, but for warehouse-rent also.

The sixth and last class of bailments is (according to Lord Holt) *mandatum*, or a delivery of goods to somebody who is to carry them, or do something about them, *gratis*. And this might have been classed under the same head with *depositum*. For as the *keeping*, *carrying*, and *working upon* goods *for hire* are all included, both by Lord Holt and Sir W. Jones, under the same head, there seems no good reason why the *keeping*, *carrying*, and *working upon* them *gratuitously* should not have been so likewise. Certain it is, that the liabilities of the *depository* and of the *mandatary* are precisely the same; both (in the absence, at least, of a contract in special terms) are bound to *slight diligence*, and to slight diligence only, and liable for nothing short of *gross negligence*, the reason in each case being the same, namely, that neither is to receive any reward for his services. Accordingly, whenever the extent of a mandatary's liability is discussed we find the cases respecting that of depositaries cited, and relied upon, and so *vice versa*. The cases of *Beauchamp v. Powley*, 1 M. & Rob. 38; *Shiells v. Blackburne*, 1 H. Bl. 158; and *Dartnall v. Howard*, 4 B. & C. 345, the facts of which are respectively stated at the com-

mencement of this note, were decisions on the responsibility of mandataries, and from those, as well as from the general principle, it appears that such bailees are liable for *gross negligence*, and for that only.

A gratuitous agent is, however, bound to use such skill as he possesses; for instance, a person who rides a horse gratuitously at the owner's request for the purpose of showing him for sale, if proved to be a person skilled in the management of horses, is held equally liable with a borrower for injury sustained by the horse whilst ridden by him, *Wilson v. Brett*, 11 M. & W. 113.

As to what amounts to such an undertaking of a gratuitous office or employment, as will impose a liability to fulfil its duties, see *Elsee v. Gaterward*, 5 T. R. 143, *Balfe v. West*, 13 C. B. 466; [and *Fish v. Kelly*, 17 C. B. N. S. 194].

From the above cursory view of the law of bailments, it will be seen that, besides the six classes, enumerated by Lord Holt, bailees may be distributed into three general classes, varying from one another in their degrees of responsibility. The *first* of these is, where the bailment is for the benefit of the bailor alone: this includes the cases of *mandataries* and *deposits*, and in this the bailee is liable only for *gross negligence*. The *second* is, where the bailment is for the benefit of the bailee

alone: this comprises *loans*, and in this class the bailee is bound to *the very strictest diligence*. The *third* is, where the bailment is for the benefit both of bailor and bailee; this includes *locatio rei*, *vadium*, and *locatio operis*, and in this class an *ordinary and average degree of diligence* is sufficient to exempt the bailee from responsibility.

A bailee dealing negligently with goods intrusted to him does not thereby necessarily lose his character of bailee so as to be liable as for a conversion, see *Heald v. Carey*, 11 C. B. 977. *Contrà* if he commits an active wrong which determines the bailment, *Clark v. Gilbert*, 2 N. C. 356; *Cooper v. Willomatt*, 1 C. B. 672. See *Austin v. Manchester, &c., Rail. Co.*, 10 C. B. 454; [*Fenn v. Bittlestone*, 7 Exch. 152; *Chinery v. Viall*, 5 H. & N. 288; *Johnston v. Stear*, 15 C. B. N. S. 330; S. C. 33 L. J. C. P. 130. Replevin will not lie at suit of the bailor against a person to whom the bailee has delivered the goods. *Mennie v. Blake*, 6 E. & B. 842.

In the recent case of *Blakemore v. Bristol and Exeter Rail. Co.*, 8 E. & B. 1035, Mr. Justice Coleridge, delivering the judgment of the court, made some valuable remarks on the duty of the gratuitous lender of a chattel to disclose defects in it of which he is aware. "It is surprising," said the learned judge, "how little in the way of decision in our courts

is to be found in our books upon the obligations which the mere lender of a chattel for use contracts towards the borrower. Pothier, in his '*Traité du Prêt à Usage*,' to be found in the 4th vol. of his works by Dupin, pt. 3, pp. 37 to 42, enters into the subject at some length; and Story also treats of it, *Bailment*, s. 275. The principles which these two writers draw mainly from the Roman law, may be the more safely relied on as engrafted into the common law, considering that the whole of this branch of our law is so mainly built on the Roman, as the judgment in *Coggs v. Bernard* demonstrates. It may, however, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Adjuvari quippe nos, non decipi, beneficio oportet*, is the maxim which Story borrows from the Digest; and

Pothier is express to the same effect, citing, as Story does also, the instance, *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve est, condemnandus eo nomine est*. This is so consonant to reason and justice, that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs v. Bernard*, and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden, in the *Nisi Prius* cases cited in the note, 1 Lea. Ca. 162 (4th ed.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By

the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him." See also *McCarthy v. Young*, 6 H. & N. 329; S. C. 30 L. J. Exch. 227.

By the 24 & 25 Vict. c. 96, s. 3, any person who, being a bailee of any property, fraudulently takes or converts it to his own use or the use of any person other than the owner, is to be deemed guilty of larceny, although he do not break bulk or otherwise determine the bailment. A person who has received money from another, and is only bound to return the amount, not the identical coins, is not a bailee within this section, *Reg. v. Hassall*, 30 L. J. M. C. 175; *query*, can a *feme covert* be so? *Reg. v. Robson*, 31 L. J. M. C. 22; see further as to who is a bailee within the section, *Reg. v. Bunkall*, 33 L. J. M. C. 75.]

ASHBY v. WHITE ET ALIOS.

TRINITY.—2 ANNÆ.

[REPORTED LORD RAYMOND, 938.]

A man who has a right to vote at an election for members of parliament may maintain an action against the returning officer for refusing to admit his vote, though his right was never determined in parliament, and though the persons for whom he offered to vote were elected (a).

BUCKINGHAMSHIRE *to wit.* Matthias Ashby complains of William White, Richard Talbois, William Bell, and Richard Heydon, being in the custody of the marshal of the Marshalsea of the lord the king, before the king himself, for that, *to wit*, That whereas, on the 26th day of November, in the 12th year of the reign of the lord the now king, a certain writ of the said lord the now king, issued out of the Court of Chancery of him the said lord the now king, at Westminster, in the county of Middlesex, directed to the then sheriff of Buckinghamshire aforesaid, reciting that the said lord the king, by the advice and assent of his council, for certain arduous and urgent businesses concerning him the said lord the king, the state, and the defence of his realm of England, and of the church of England, had ordained his certain parliament to be holden at his city of Westminster, on the 6th day of February, then next coming, and there with the prelates, nobles, and peers of his said kingdom, to have discourse and treaty, the said lord the now king commanded the then sheriff toms, for refusing to sign a bill of entry, without payment of an excessive duty, *Barry v. Arnaud*, 10 A. & E. 646. See as to an action against a clergyman for refusing to marry, *Davis v. Black*, 1 Q. B. 900.

(a) S. C. Salk. 19. 3 Salk. 17. Holt, 524. 6 Mod. 45. *Vide* 1 Bro. Parl. Cas. 47. 8 St. Tr. 89. Somewhat similar to this action is that of *Perring v. Harris*, 2 Moo. & Rob. 5, against an overseer for maliciously omitting a parishioner's name from the rate, *per quod* she was unable to obtain a beer licence. So, against a sheriff for delaying to execute a writ, *per quod*, the plaintiff incurred unnecessary costs. *Mason v. Paynter*, 1 Q. B. 974. So, against an officer of cus-

Declaration.

of Buckinghamshire, by the said writ firmly enjoining, that, having made proclamation in his next said county court after the receipt of the same writ to be holden, of the day and place aforesaid, two knights, girded with swords, the most fitting and discreet of the county aforesaid, and of every city of that county two citizens, and of every borough two burgesses of the more discreet and most sufficient, should be freely and indifferently chosen by those whom such proclamation should concern, according to the form of the statute thereupon made and provided, and the names of the said knights, citizens, and burgesses, so to be chosen, to be inserted in certain indentures thereof, to be made between him, the then sheriff, and those who should be concerned at such election (although such persons to be chosen should be present or absent), and should cause them to come at the said day and place ; so that they the said knights, citizens, and burgesses, might severally have full and sufficient power for themselves and the commonalty of the county, cities, and boroughs aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm of him the said lord the now king (by God's assistance), upon the businesses aforesaid ; so that for want of such power, or because of an improvident election of the knights, citizens, and burgesses aforesaid, the said businesses might not in anywise remain undone ; and should certify, without delay, that election made in the full county of him the then sheriff, distinctly and openly, under his seal, and the seals of those who should be concerned at that election, to the said lord the now king, in his Chancery, at the said day and place ; sending to him the said lord the king the counterpart of the indenture aforesaid, sewed to the same writ, together with that writ ; which said writ, afterwards, and before the 6th day of February in the writ aforesaid mentioned, *to wit*, on the 29th day of December, in the twelfth year abovesaid, at the borough of Aylesbury, in the said county of Bucks, was delivered to one Robert Weedon, Esq., then sheriff of the same county of Bucks, to be executed in form of law ; by virtue of which said

writ, the aforesaid Robert Weedon, being then and there Declaration.
sheriff of the county of Bucks aforesaid, as before is set forth, afterwards and before the aforesaid 6th day of February, *to wit*, on the 30th day of December, in the 12th year abovesaid, at the borough of Aylesbury aforesaid, in the said county of Bucks, made his certain precept in writing, under the seal of him the said Robert Weedon, of his office of sheriff of the county of Bucks aforesaid, directed to the constables of the borough of Aylesbury aforesaid, reciting the day and place of the parliament aforesaid to be holden, thereby requiring them and giving to them in command, that having made proclamation within the borough aforesaid of the day and place in the same precept recited, they should cause to be freely and indifferently chosen two burgesses of that borough, of the more discreet and most sufficient, by those whom such proclamation should concern, according to the form of the statutes in such cases made and provided, and the names of the said burgesses so elected (although they should be present or absent) to be inserted in certain indentures between the said sheriff and those who should have interest in such election; and that he should cause them to come at the day and place in the same precept recited, so that the said burgesses might have full and sufficient power for themselves and the commonalty of the borough aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm (by God's assistance) upon the business aforesaid; so that for want of such power, or because of an improvident election of the burgesses aforesaid, the said businesses might not remain undone; and that they should, without delay, certify the election to him the said then sheriff, sending to the same sheriff the counterpart of the indenture aforesaid annexed to the said precept, that he the said sheriff might certify the same to the said lord the king in his Chancery at the day and place aforesaid, which said precept afterwards and before the said 6th day of February, *to wit*, on the same 30th day of December in the year abovesaid, at the borough of Ayles-

Declaration.

bury aforesaid, in the said county of Bucks, was delivered to them the said William White, Richard Talbois, William Bell, and Richard Heydon, then, and until after the return of the same writ, being constables of the borough of Aylesbury aforesaid, to be executed in form of law; to which said William White, Richard Talbois, William Bell, and Richard Heydon, by reason of their office of constables of the borough aforesaid, the execution of that precept of right did then and there belong: by virtue of which said precept, and by force of the writ aforesaid, they the said burgesses of the borough of Aylesbury, being in that behalf duly forewarned, afterwards and before the 6th day of February, *to wit*, on the 6th day of January in the 12th year abovesaid, at the borough of Aylesbury aforesaid, before them the said William White, Richard Talbois, William Bell, and Richard Heydon, the constables aforesaid, were assembled to elect two burgesses for the borough, according to the exigency of the writ and precept aforesaid, and during that assembly, to that intention, and before such two burgesses, by virtue of the writ and precept aforesaid, were elected, *to wit*, on the day and year last abovesaid at the borough of Aylesbury aforesaid, in the county aforesaid, he, the said Matthias Ashby, then and there, being a burgess and an inhabitant of the borough aforesaid, and not receiving alms there or anywhere else, then or before, but being duly qualified and entitled to give his vote for the choosing of two burgesses for the borough aforesaid, according to the exigency of the writ and precept aforesaid, before them the said William White, Richard Talbois, William Bell, and Richard Heydon, the four constables of that borough, to whom then and there it did duly belong to take and allow the vote of him the said Matthias Ashby, of and in the premises, was ready and offered to give his vote for choosing Thomas Lee, bart., and Simon Mayne, esq., two burgesses for that parliament, by virtue and according to the exigency of the writ and precept aforesaid; and the vote of him, the said Matthias, then and there of right ought to have been admitted; and the aforesaid William White, Richard

Talbois, William Bell, and Richard Heydon, so being then Declaration.
and there constables of the borough aforesaid, were then
and there requested to receive and allow the vote of him
the said Matthias Ashby, in the premises; nevertheless
they, the said William White, Richard Talbois, William
Bell, and Richard Heydon, being then and there con-
stable of the borough aforesaid, well knowing the pre-
mises, but contriving, *and fraudulently and maliciously*
intending to damnify him the said Matthias Ashby, in
this behalf, and wholly to hinder and disappoint him of
his privilege of and in the premises, did then and there
hinder him, the said Matthias Ashby, to give his vote in
that behalf, and did then and there absolutely refuse to
permit him, the said Matthias Ashby, to give his vote for
choosing two burgesses for that borough to the parliament
aforesaid, and did not receive, nor did they allow the
vote of him, the said Matthias Ashby, for that election:
and two burgesses of that borough were elected for the
parliament aforesaid (he, the said Matthias Ashby, being
excluded, as before is set forth) without any vote of him,
the said Matthias Ashby, then and there, by virtue of the
writ and precept aforesaid, to the enervation of the afore-
said privilege of him, the said Matthias Ashby, of and
in the premises aforesaid: whereupon the said Matthias
Ashby saith that he is injured, and hath sustained damage
to the value of 200*l.*, and thereupon he brings suit, &c.
Not guilty. Verdict for the plaintiff.

Plea and

Note.—Judgment was arrested in B. R. by three judges against *Holt*. But on the 14th of January, 1703, this judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen.

After a verdict for the plaintiff on not guilty pleaded, it was moved in arrest of judgment by Serjeant *Whitaker* that this action was not maintainable. And for the difficulty, it was ordered to stand in the paper, and was argued Trin. 1 Q. Anne by Mr. *Weld* and Mr. *Montague* for the defendants, and this term judgment was given against the plaintiff, by the opinion of *Powell*, *Powys*, and *Gould*,

Motion in arrest
of judgment.

justices, *Holt*, Chief Justice, being of opinion for the plaintiff.

GOULD, J.

Gould, J.—I am of opinion, that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff, for there are no footsteps to warrant such an opinion, but only a single case. I am of opinion, that this action is not maintainable for these four reasons: first, because the defendants are judges of the thing, and act herein as judges; secondly, because it is a parliamentary matter, with which we have nothing to do; thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely *damnum sine injuria*; fourthly, it relates to the public, and is a popular offence.

As to the first, the king's writ constitutes the defendant a judge in this case, and gives him power to allow or disallow the plaintiff's vote. For this reason it is, that no action lies against a sheriff for taking insufficient bail, because he is the judge of their sufficiency. So is the case of *Medcalf v. Hodgson*, Hutt. 120, and their sufficiency is not traversable, 1 Lev. 86, *Bentley v. Hore*. Upon the same reason the resolution of the court is founded in the case of *Hammond v. Howell*, 2 Mod. 218, that no (a) action lies against a man for what he does as a judge. 9 Hen. fo. pl. 9.

(a) *Vide* L.
Ray. 454.

2. This is a parliamentary matter, and the parliament is to judge whether the plaintiff had a right of electing or not, for it may be a dispute whether the right of election be in a select number or in the populace; and this is proper for the parliament to determine, and not for us; and if we should take upon us to determine that he has a right to vote, and the parliament be of opinion that he has none, an inconvenience would follow from contrary judgments. So in 2 Vent. 37, *Onslow's Case*, it is adjudged that no (b) action lies for a double return of members to serve in parliament. The resolution of the King's Bench in the case of *Barnardiston v. Soame*, 2 Lev. 114, was given on this particular reason, that there had been a determination before in parliament in favour of the plain-

(b) D. cont.
1 Wils. 127.

tiff. And *Hale* said, we pursue the judgment of the parliament; but the plaintiff would have been too early, if he had come before; and yet that judgment was reversed. GOULD, J.

3. It is not any matter of profit, either *in presenti* or *in futuro*. To raise an action upon the case, both damage and injury must concur, as in the case of 19 Hen. 6. 44, cited Hob. 267. If a man forge a bond in another's name, no action upon the case lies, till the bond be put in suit against the party: so here, it may be this refusal of the plaintiff's vote may be no injury to him, according as the parliament shall decide the matter; for they may adjudge, that he had no right to vote, whereby it will appear, the plaintiff was mistaken in his opinion as to his right of election, and consequently has sustained no injury by the defendant's denying to take his vote.

4. It is a matter which relates to the public, and is a kind of popular offence, and therefore no action is given to the party; for by the same reason one man may bring an action, a hundred may, and so actions infinite for one default: which the law will not allow, as is agreed in *Williams' Case*, 5 Co. 73 a. and 104 b. *Boulton's Case*. Perhaps, in this case, after the parliament have adjudged the plaintiff has a right of voting, an information may lie against the sheriff for his refusal to receive it. So the case of *Ford v. Hoskins*, 2 Cro. 368. 2 Brownl. 194. Such an action as this was never brought before, and therefore shall be taken not to lie, though that be not a conclusive reason. As to the case of *Sterling v. Turner*, 3 Lev. 50. 2 Vent. 50. where an action was brought by the plaintiff, who was candidate for the place of bridg-master of London, for refusing him a poll, and adjudged maintainable, there is a loss of a profitable place. So the case of *Herring v. Finch*, 2 Lev. 250, where the plaintiff brought an action on the case against the defendant, for that the plaintiff being a freeman, who had a voice in the election of mayor, the defendant being the present mayor refused to admit his voice; in that case the defendant is guilty of a breach of his faith: and in both these cases the plaintiff has no other remedy, either in parliament or

GOULD, J. anywhere else, as the plaintiff in our case has. So that I am of opinion that judgment ought to be given for the defendant upon the merits. But upon this declaration the plaintiff cannot maintain any action, for the plaintiff does not allege in his count that the two burgesses elected were returned, and if they were never returned, there is no damage to the plaintiff. See 2 Bulstr. 265. But I do not rely upon this fault in the declaration.

POWYS, J.—I am of the same opinion, that no action lies against the defendant, 1. Because the defendant as bailiff is *quasi* a judge, and has a distinguishing power either to receive or refuse the votes of such as come to vote, and does preside in this affair at the time of election: though this determination be not conclusive, but subject to the judgment of the parliament, where the plaintiff must take his remedy.

2. If the defendant misbehave himself in his office by making a false or double return, an action lies against him for it on the late statute, 7 & 8 W. 3, c. 7, and therein all this matter of refusing the plaintiff's vote is comprised, and all the special matter is scanned in that action. And if you allow the plaintiff to maintain an action for this matter, then every elector may bring his action, and so the officer shall be loaded with a number of actions that may ruin him; and he may follow one law suit, though he may not be able to follow many. These actions proceed from heat, I will not call it revenge; and it is not like splitting of actions, *scilicet*, of one cause of action into many, but the causes of action are several, and the court cannot unite them, but A., B., C., D., E., and a hundred more may at this rate bring actions.

3. There is a vast intricacy in determining the right of electors, and there is a variety, and a different manner and right of election in every borough almost. As in some boroughs every potwaller has a right to vote, in some residents only vote, and in others the outlying burgesses that live a hundred miles off; nay, I know *Ludlow* a borough, where all the burgesses' daughters' husbands have a right to vote. But now all this matter is comprised

in an action against the officer for a false return. But it is objected that by the law of England every one who suffers a wrong has a remedy ; and here is a privilege lost, and shall not the plaintiff have a remedy ? To that I answer, first, it is not an injury, properly speaking ; it is not *damnum*, for the plaintiff does not lose his privilege by this refusal, for when the matter comes before the committee of elections, the plaintiff's vote will be allowed as a good vote ; and so in an action upon the case by one of the candidates for a false return, this tender of his vote by the plaintiff shall be allowed as much as if it had been given actually and received. And if this refusal of the plaintiff's vote be an injury, it is of so small and little consideration in the law, that no action will lie for it ; it is one of those things within the maxim, *de minimis non curat lex*. In the case of *Ford v. Hoskins*, 2 Cro. 368. Mod. 833. 2 Bulstr. 336. 1 Roll. Rep. 125, where an action is brought against the lord of a copyhold manor, for refusing to accept one named as successor for life by the preceding tenant for life, according to the custom, there the plaintiff suffers an injury, and yet it is adjudged that no action lies. The late statute 7 & 8 W. 3, c. 7, gives an action against the officer for a misfeasance to the party grieved, *i. e.* to the candidate, who is to have his vote ; so that by the judgment of the parliament he cannot have any action. Before the statute of 23 Hen. 6, no (a) action lay for the candidate, who was the party aggrieved, against the officer, for a false return, because it related to parliamentary matters, as is adjudged 3 Lev. 29, 30, *Onslow v. Raply*, and yet he had an injury ; and till the 7 & 8 W. 3, no (b) action lay for the candidate against the officer for a double return, as is adjudged in the same case, 3 Lev. 29. 2 Ventr. 37, and yet he suffered an injury thereby ; *à fortiori* no action shall lie for the plaintiff in this case.

4. This action is not maintainable for another reason, which I think is a weighty one, *viz.* this action is *primæ impressionis* ; never the like action was brought before, and therefore as (c) Littleton, s. 108, uses it to prove that no action lay on the statute of Merton, 20 Hen. 3, c. 6, *si*

POWYS, J.

(a) D. cont. 1
Wils. 127.

(b) *Ibid.*

(c) *Vide Co.*
Litt. 81. b.
13 Ed. n. 2.

POWYS, J.

(a) D. cont. 1
Wils. 127.

parentes conquerantur, for if it had lain, it would have sometimes been put in use : so here. So in the case of Lord *Say and Seale v. Stephens*, Cro. 142. for the law is not apt to catch at actions. It is agreed by the consent of all ages, that no (a) action lay at common law against the officer for a double return ; and yet in one year, viz. 1641, there were no less than seventy double returns, and yet they made no act to help it, though the parliament could not be misconusant of the matter.

5. Another reason against the action is, that the determination of this matter is particularly reserved to the parliament, as a matter properly conusable by them ; and to them it belongs to determine the fundamental rights of their house, and of the constituent parts of it, the members ; and the courts of Westminster shall not tell them who shall sit there. Besides we are not acquainted with the learning of elections ; and there is a particular cunning in it not known to us, nor do we go by the same rules, and they often determine contrary to our opinion without doors. The late statute, which enacts that the last determination of the house as to the right of election shall be a rule to the judges in the trial of any cause, is a declaration of their power ; and the paths the judges are to walk in are chalked out to them, so that they are not left to use their own judgment ; but the determination of the house is to be the rule of law to us, and we are not to examine beyond that. Suppose in this action we should adjudge one way, and after in parliament it should be determined another way ; or suppose a judge of *nisi prius*, before whom the cause comes to be tried, should say, "I am not bound by the rule of the last determination in parliament in this action, for this is another sort of action, not within the meaning of the statute : " these things would be of ill consequence.

6. Another reason against this action is, that if we should allow this action to lie for the plaintiff, *à fortiori* we must allow an action to be maintainable for the candidates against the defendant for the same refusal ; for the candidates have both *damnum et injuriam*, and are the parties aggrieved ; and if we should allow that, we shall multiply actions upon

the officers, at the suit of the candidates, and every particular elector too; so that men will be thereby deterred from venturing to act in such offices, when the acting therein becomes so perilous to them and their families. I will not insist upon the exceptions to the declaration, but give my opinion upon the merits. I think there is a sufficient allegation in the count of the return of the election, especially after a verdict. Nor shall I insist that it does not appear in the declaration how near the party was to be chosen; nor that this action is brought merely for a possibility; for this is an action for a personal injury; and the plaintiff might give his vote for which he pleased, either the candidate that had fewer or more voices; or he might give his vote for one who had no other burgess's voice but the plaintiff's own; for the plaintiff, in those cases, is deprived as much of his privilege as if the person for whom he voted was nearest to be chosen. But it has been objected, that the defendant should not have absolutely refused to receive the plaintiff's vote, but should have reserved it for scrutiny, and should have admitted it *de bene esse*. To that I answer: he might indeed have done so; but he was not obliged to do it, for the officer is supposed to know every man's right and pretence of election, and commonly the weaker party are for bringing in new votes, and devising new contrivances; but the officer ought to disallow them at first, and not to give so much countenance to such a practice as to reserve it for a scrutiny. As here in Westminster-hall, when a matter of law comes before us, if it be a clear case, we may give judgment in it on the first argument, and it will be a good judgment, although it be usual to hear several arguments. The objection of weight is the resolution between *Sterling* and *Turner*, 2 Lev. 50. Hale said that it was a good precedent: and the case of *Herring* and *Finch*, 2 Lev. 250, though as to that case it was not adjudged upon the matter of law, but went off upon a point of evidence, yet I will admit the action to lie for the plaintiff in those cases, but they do not at all relate to the parliament, but are matters of custom merely relating to the government

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(a) *Vide* 2 G.
2, c. 24, s. 4.
1 Dougl. on
Elections, 18.

of the city, and are properly determinable at common law. And although it may be said, that this case also relates to the government of the town, so does a public nuisance in a highway; but if a particular person receive an injury, he may have his action; but that does not relate to the parliament as this matter does; and the whole case here turns upon that, *viz.* its being a parliamentary matter. If we should admit this action to lie, we shall have work enough in Westminster-hall, brought in by a side-wind; nay, so much, that we shall even be glad to petition the parliament to take this power away from us. Besides, the judgment here cannot be called properly a determination; it will only be a litigation; for our judgment cannot be cited as an authority in parliament, nor will the parliament mind it, or be bound up by it, for they (a) themselves are not bound even by their own determination, but may determine contrary to it, though that be a rule upon the courts of Westminster. But it has been objected, that this is no determination of the election in this judgment, but only of a particular injury. To that I answer, It will be in consequence of a determination of the election; for if the plaintiff had a right to vote, then this action is maintainable; if he has no right, then he can have no action; and, by consequence, twenty others may have a right to vote, and the election may turn upon this single vote; and his right of voting is as much parliamentary as the whole election, and may as much entangle the case. It is said in *Onslow's Case*, 2 Vent. 37, that the courts at Westminster must not enlarge their jurisdiction in these matters, further than the statute gives them; and indeed it is a happiness to us that we are so far disengaged from the heats which attend elections. Our business is, to determine of *meum* and *tuum*, where the heats do not run so high as in things belonging to the legislature: therefore, this being an unprecedented case, I shall conclude with a saying of my Lord Coke, 2 Bulst. 338: *Omnis innovatio plus novitate perturbat quam utilitate prodest.*

Powell, J.—I am of the same opinion, that the judgment

ought to be arrested. As to the novelty of this action, POWELL, J. I think it no argument against the action; for there have been actions on the case brought that have never been brought before, but had their beginning of late years; and we must judge upon the same reason as other cases have been determined by. I do not agree with my brothers upon their first reason, that the defendant is a judge. I do not understand what my brother *Powys* means by saying he is *quasi* a judge: surely he must be a judge or no judge. The bailiff is not a judge, but only an officer or minister to execute the precept. But I agree with them in their other reasons to give judgment against the plaintiff; and chiefly, because in this action there does not appear such an injury or damage as is necessary to maintain an action on the case. An injury must have relation to some privilege the party has. The case of *Turner* and *Sterling*, 2 Lev. 50, is adjudged upon a particular reason; for the defendant, by refusing him the poll, deprived him of the means of knowing whether he had a right or not. If *cestuy que use* desires the feoffees to make a feoffment over to another, and they refuse, no action upon the case lies against them for this refusal. And in the case of *Ford* against *Hoskins*, 2 Bulstr. 337, 2 Cro. 368, it is resolved that no action lies for the nominee against the lord, for refusing to keep a court, and to admit him;† yet this is a hard case, for the party is thereby deprived of the means of coming to his right. But that case differs from the case of *Sterling* v. *Turner*; for the party hath a known remedy in Chancery, to compel the lord to hold a court and admit him, but the other hath no remedy against the mayor but an action. Here is no injury to the plaintiff; for though he has alleged in his declaration, that he had a right to vote, and was hindered of it by the defendant,

† But he may have a mandamus. *Rex* v. *Lord of the Manor of Hendon*, 2 T. R. 484; *Rex* v. *Coggan*, 6 East, 481. And so may the heir, *Rex* v. *Masters of Brewers' Co.* 3 B. & C. 172; though in *Rex* v. *Rennett*, 2 T. R. 197, it

had been held otherwise. So may the surrenderee of the heir, although the heir was not admitted, upon payment of the proper fine, including the fine payable upon the descent to the heir. *Rex* v. *Dullingham*, 8 A. & E. 858; 1 P. & D. 172, S. C. But where the heir's title is clearly barred by lapse of time, a mandamus will not be granted to admit him, for he may bring ejectment without. *Rex* v. *Agardsley*, 5 Dowl. 17. And in cases involving questions of equity, e.g. that of the surrenderee of a trustee appointed under 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, the Court of Queen's Bench will not interfere by mandamus. *Rex* v. *Pitt*, 10 A. & E. 272. Also, inasmuch as the lord must be included in the writ, no mandamus lies to admit to a copyhold held of the crown. *Rex* v. *Pouell*, 1 Q. B. 352.

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yet that does not give him a right, unless the finding thereof by the jury do confer such right ; but that cannot be so, for the jury cannot judge of this right in the first instance, because it is a right properly determinable in parliament. The parliament have a peculiar right to examine the due election of their members, which is to determine whether they are elected by proper electors, such as have a right to elect ; for the right of voting is the great difficulty in the determination of the due election, and belongs to the parliament to decide. But it is objected, admitting the plaintiff had a right to vote, and was deprived of it, shall he have no remedy ? To that I answer, he shall have a remedy in proper time ; but the plaintiff here comes too soon ; he shall have a remedy by action after the parliament have determined that he had a right, but not before. This is not such a right, the deprivation whereof will make an injury, till it be determined in parliament. But the plaintiff has a proper remedy by petition to the parliament setting forth his case ; and after the parliament have adjudged that he had a right of voting, he shall have an action at law to recover damages, when his right is so fixed and settled. The opinion of my lord Hobart in the case of Sir *William Elvis* and the Archbishop of *York*, Hob. 317, 318, and the reason of that opinion comes very near to the present case : That if the church be litigious, and two clerks be presented to the ordinary, and he award a *jure patronatus* † to inquire which patron has the right, and the inquest find for one, and yet the ordinary receive the clerk of the other, contrary to the finding of the jury, in that case if the other patron bring his *quare impedit* against the usurper and his incumbent, not naming the bishop, and proves his title, he may afterwards have an action upon the case against the ordinary, for that wilful wrong, delay, and trouble, that he hath put him to ; and he shall recover costs and damages, not in respect of the value of the church (for there are no damages for that by the common law, but by West. 2, 13 Edw. 1, st. 1, c. 5, s. 3), but for the other respects before mentioned. But if he name the ordinary

† See the nature of this proceeding explained, 3 Bl. Comm. 246.

in the *quare impedit*, he can have no other action of the case ; neither shall he have such action upon the case before he hath tried his title in a proper action, and against the proper parties. So that in that case, though the patron's right, being found by the jury on the *jure patronatus*, is in some measure determined, yet he shall not maintain an action upon the case against the ordinary, but he must first prove his title in a proper manner by a *quare impedit*, and thereby prove the ordinary a disturber; and after that he may bring his action on the case, against the ordinary for his damages. Where the party has no possibility of settling his right, as in the case of *Sterling and Turner*, there he shall maintain his action for the disturbance before his right be settled ; but where he has a proper method, as in our case, he shall not maintain an action till his right be determined ; and the reason of this difference is very strong, because of the inconveniences of contrary determinations upon the several actions, or of the different judgments by the House of Commons, and the judges at common law : for the house may be of opinion that the plaintiff has a right to vote, and yet the judges may be of opinion upon the action that he hath none, and give judgment against him ; and even though he has a right, he will have no remedy ; *et e converso*. But this difference of opinions will be prevented by such previous application to the house before any action brought. Besides, in this case, here is not a damage, upon which this action is maintainable ; for, to maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion, or consequence of law. For a possibility of a damage, as an action upon the case, lies for the owner of an ancient market, for erecting a new market near his ; and yet perhaps the cattle that come to the old market might not be sold, and so no toll due ; and consequently no real damage, but there is a possibility of damage. But in our case there is no possibility of a damage. It is laid in the declaration, that the defendant obstructed him from giving his vote ; but

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that is too general, without showing the manner how he obstructed him, as that the defendant kept him out of the usual place where the votes are taken. The plaintiff shows no damage in his count, and the verdict will not supply it, for the plaintiff ought always allege a damage, as in an action upon the case brought against the lessee by him in the reversion, for refusing to permit him to enter to view waste, it would not be sufficient to allege thus generally, that the defendant obstructed him, &c. It is laid here, that the defendants *ipsum* the plaintiff *ad suffragium suum dare obstruxerunt, et penitus recusaverunt*: I do not know what that means in this case. Indeed, it is a sufficient description of a disseisin of a rent seck; but if the plaintiff gives his vote for a candidate, that is as effectual as if the officer writ it down, for it is his vote by the giving of it, and the officer cannot hinder him of it, and on a poll it will be a good vote, and must be allowed, and so there is no wrong done to the plaintiff, for his vote was a good vote notwithstanding what the defendant did. Besides, the plaintiff can make no profit of his vote; and it is like the case of a *quare impedit*, in which the plaintiff at common law recovered no damages, because he ought not to sell the presentation, and so could make no profit of it. So here, for it would be criminal for the plaintiff to sell his vote. Perhaps the putting the plaintiff to trouble and charge, to maintain and vindicate his right of voting, might be sufficient damage to maintain an action on the case; but as our case is, I cannot see that the plaintiff has received any damage. Great inconveniences do attend the allowance of this action, as my brothers have said; as that it will occasion multiplicity of actions, and for that reason it is, that the law gives no action to a private person for a public nuisance, for there is a remedy by indictment to redress it. So here the plaintiff has a remedy in parliament. As to the case of *Westbury v. Powell*, Co. Lit. 50. a, where the inhabitants of Southwark had a watering-place for their cattle by custom, which was stopped up, there any inhabitant might have an action, because there was no other remedy by

presentment or the like; but if it had been a nuisance presentable, no action (a) would have lain. So in the case of *Sterling* and *Turner*, the party had no other remedy. So in the case of *Herring* and *Finch*, which is a strong case; and I do not know whether an action will lie in that case, for refusing to admit his voice to the election of a mayor; but there the plaintiff has no other remedy, nor other way to settle his right. If we should adjudge that this action lies, it will be dangerous to execute any office of this nature, and will deter men from undertaking public offices, which will be a thing of ill consequence. I am of opinion upon the whole matter, that after a determination in the parliament for the plaintiff's right, the trouble and charge of vindicating it will maintain an action, but in this case no action lies, and therefore the judgment ought to be arrested.

Holt, Chief Justice.—The single question in this case is, Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer?

I am of opinion that judgment ought to be given in this case for the plaintiff. My brothers differ from me in opinion; and they all differ from one another in the reasons of their opinion; but notwithstanding their opinion, I think the plaintiff ought to recover, and that this action is well maintainable and ought to lie. I will consider their reasons. My brother *Gould* thinks no action will lie against the defendant, because, as he says, he is a judge; my brother *Powys* indeed says, he is no judge, but *quasi* a judge; but my brother *Powell* is of opinion, that the defendant neither is a judge, nor anything like a judge, and that is true: for the defendant is only an officer to execute the precept, *i. e.* only to give notice to the electors of the time and place of election, and to assemble them together in order to elect, and upon the conclusion to cast up the poll, and declare which candidate has the majority.

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(a) *Vide* L. Ray. 486.

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[Lord Holt's argument has been more fully and lucidly set forth by himself in a manuscript first published in 1837, at the request of Lord Denman, under the title of "The judgments of Lord Holt in the case of *Ashby v. White and John Patey and others.*" This manuscript contains probably a revised form of the judgment prepared for use in the House of Lords, post 269 n.]

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But to proceed, I will do these two things: First, I will maintain that the plaintiff has a right and privilege to give his vote: Secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

I did not at first think it would be any difficulty to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it. It is not to be doubted, but that the Commons of *England* have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exerciseable by them in their proper persons, and therefore by the constitution of *England*, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of *England* vested in them: and this representation is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs; and these are the persons qualified to represent all the Commons of *England*. The election of knights belongs to the freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold, than the freehold itself can be taken away. Before the statute of 8 Hen. 6, c. 7, any man that had a freehold, though never so small, had a right of voting, but by that statute the right of election is confined to such persons as have lands or tenements to the yearly value of forty shillings at least, because, as the statute says, of the tumults and disorders which happened at elections, by the excessive and outrageous number of electors; but still the right of election is an original right, incident to, and inseparable from the freehold. As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation. Now, boroughs

are of two sorts: first, where the electors give their voices HOLT, C. J.
 by reason of their burgership; or, secondly, by reason of
 their being members of the corporation. *Littleton*, in his
 chapter of tenure in burgage, 162. C. L. 108. b. 109. says
 "Tenure in burgage is, where an ancient borough is, of
 the which the king is lord, of whom the tenants hold
 by certain rent, and it is but a tenure in socage;" and
 sect. 164. he says, "and it is to wit, that the ancient
 townes called boroughs be the most ancient towns that be
 within *England*, and are called boroughs, because of them
 come the burgesses to parliament." So that the tenure of
 burgage is from the antiquity, and their tenure in socage
 is the reason of their estate, and the right of election is
 annexed to their estate. So that it is part of the consti-
 tution of *England*, that these boroughs shall elect members
 to serve in parliament, whether they be boroughs corporate
 or not corporate; and in that case the right of election is
 a privilege annexed to the burgage land, and is, as I may
 properly call it, a real privilege. But the second sort is,
 where a corporation is created by charter, or by prescrip-
 tion, and the members of the corporation as such choose
 burgesses to serve in parliament. The first sort have a
 right of choosing burgesses as a real right, but here in
 this last case it is a personal right, and not a real one,
 and is exercised in such a manner as the charter or
 custom prescribes; and the inheritance of this right, or
 the right of election itself, is in the whole body politic,
 but the exercise and enjoyment of this right is in the
 particular members. And when this right of election is
 granted within time of memory, it is a franchise that can
 be given only to a corporation; as is resolved by all the
 judges against my lord *Hobart*, in the case of *Dungannon*
 in *Ireland*, 12 Co. 120, 121, that if the king grant to the
 inhabitants of *Islington* to be a free borough, and that the
 burgesses of the same town may elect two burgesses to
 serve in parliament, that (a) such a grant of such privilege
 to burgesses not incorporated is void, for the inhabitants
 have not capacity to take an inheritance. See *Hob. 15.*
 The principal case there was, the king constituted the

(a) *Vide Co.*
Litt. 3 a.

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town of *Dungannon* to be a free borough, and that the inhabitants thereof shall be a body politic and corporate, consisting of one provost, twelve free burgesses and commonalty; and in the same name may sue and be sued; *et quod ipsi præfatus præpositus et liberi burgenses burghi prædicti et successores sui in perpetuum habeant plenam potestatem et auctoritatem eligendi, mittendi, et retornandi duos discretos et idoneos viros ad inserviendum et attendendum in quolibet parlamento, in dicto regno nostro Hiberniæ in posterum tenendo*, and so proceeds to give them power to treat, and give voice in parliament, as other burgesses of any other ancient borough, either in *Ireland* or *England*, have used to do. And upon this grant it was adjudged, by all the judges of *England*, that this power to elect burgesses is an inheritance of which the provost and burgesses were not capable, for that it ought to be vested in the entire corporation, *viz.* provost, burgesses, and commonalty, and that therefore the law in this case did vest that privilege in the whole corporation in point of interest, though the execution of it was committed to some persons, members of the same corporation 12 Co. 120, 121. Hob. 14, 15. As to the manner of election, every borough subsists on its own foundation, and where this privilege of election is used by particular persons, it is a particular right vested in every particular man; for if we consider the matter, it will appear that the particular members and electors, their persons, their estates, and their liberties are concerned in the laws that are made, and they are represented as particular persons, and not *quatenus* a body politic: therefore, when their particular rights and properties are to be bound (which are much more valuable perhaps than those of the corporation) by the act of the representative, he ought to represent the private persons. And this is evident from all the writs, which were anciently issued for levying the wages of the knights and burgesses that served in parliament. As 46 Edw. 3. *Ro. Parl. memb. 4 in dorso*. For when wages were paid to the members, they were not assessed upon the corporation, but upon the commonalty

as private persons, as the writ shows, which is indeed HOLT, C. J.
directed to the sheriff, or to the mayor, &c., yet the
command is ‘*quod de communitate comitatus civitatis,
vel burgi, habere, faciat militibus civibus aut burgensibus*
10l. pro expensis suis.’ But now, if the corporation were
only to be represented, and not the particular members of
it, then the corporation only ought to be at the charge;
but it is plain that the particular members are at the
charge. And this is no new thing, but agreeable to reason
and the rules of law, that a franchise should be vested in
the corporation aggregate, and yet the benefit of it to
redound to the particular members, and to be enjoyed by
them in their private capacity. As is the case of *Waller*
and *Hanger*, Mo. 832, 833, where the king granted to the
mayor and citizens of *London*, *quod nulla prisagia sint*
soluta de vinis civium et liberorum hominum de Lon-
don, &c. And there it was resolved, that although the
grant be to the corporation, yet it should not enure to the
body politic of the city, but to the particular persons of
the corporation who should have the fruit and execution
of the grant for their private wines, and it should not
extend to the wines belonging to the body politic; and so
is the constant experience at this day. So in the case of
Mellor v. Spateman, 1 Saund. 343, where the corporation
of *Derby* claim common by prescription, and though the
inheritance of the common be in the body politic, yet the
particular members enjoy the fruit and benefit of it, and
put in their own cattle to feed on the common, and not
the cattle belonging to the corporation: but that is not
indeed our case. But from hence it appears that every
man, that is to give his vote on the election of members
to serve in parliament, has a several and a particular
right in his private capacity, as a citizen or burgess. And
surely it cannot be said, that this is so inconsiderable a
right as to apply that maxim to it, *de minimis non curat*
lex. A right that a man has to give his vote at the
election of a person to represent him in parliament, there
to concur to the making of laws which are to bind his
liberty and property, is a most transcendent thing, and of

HOLT, C. J. an high nature, and the law takes notice of it as such in divers statutes: as in the statute of 34 & 35 Hen. 8, c. 13, intituled an act for making of knights and burgesses within the county and city of *Chester*; where in the preamble it is said, that whereas the said county palatine of *Chester* is, and hath been always hitherto exempt, excluded, and separated, out and from the king's court, by reason whereof the said inhabitants have hitherto sustained manifold disherisons, losses, and damages, as well in their lands, goods, and bodies, as in the good, civil, and politic governance and maintenance of the commonwealth of their said county, &c. So that the opinion of the parliament is, that the want of this privilege occasions great loss and damage. And the same farther appears from the 25 Car. 2, c. 9, an act to enable the county palatine of *Durham* to send knights and burgesses to serve in parliament, which recites, 'whereas the inhabitants of the county palatine of *Durham* have not hitherto had the liberty and privilege of electing and sending any knights and burgesses to the high court of parliament,' &c. The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. These reasons have satisfied me to the first point.

2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; (a) for want of right and want of remedy are reciprocal. As if a purchaser of an advowson in fee-simple, before any presentment, suffer an usurpation, and six months to pass, without bringing his *quare impedit*, he (b) has lost his right to the advowson, because he has lost his *quare impedit*, which was his only remedy; for he (c) could not maintain a writ of right of advowson; and though he afterwards usurp and die, and the advowson descend to his heir; yet (d) the heir cannot be remitted, but the advowson is lost for ever without recovery. 6 Co. 50. Where a man has but one remedy to come at his right, if

(a) D. acc.
Co. 58, b.

(b) *Sed nunc*,
vide 7 Ann. c.
18.

(c) *Vide* H. Bl.
1 Lit. s. 514.
Co. Lit. 293. a.

(d) *Vide* 6 Co.
58.

he loses that he loses his right. It would look very strange, when the Commons of *England* are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff or other officer to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind. Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it, nobody can say that the defendant has done well; then he must have done ill, for he has deprived the plaintiff of his right; so that the plaintiff having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. How else comes an action to be maintainable by the party on the statute of 2 Ric. 2, *de scandalis magnatum*, 12 Co. 134, but in consequence of law? For the statute was made for the preservation of the public peace, and that is the reason that no writ of error lies in the Exchequer Chamber by force of the statute of 27 Eliz. in a judgment in the King's Bench on an action *de scandalis*, for it is not included within the words of the statute: for though the statute says, such writ shall lie upon judgments in actions on the case, yet it does not extend to that action, although it be an action on the case, because (a) it is an action of a far higher degree, being founded specially upon a statute, 1 Cro. 142. If then, when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. But there wants not a statute too in this case, for by *West. 1*, 3 Edw. 1, c. 5, it is enacted, "that forasmuch as elections ought to be free, the king forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice, or menaces, shall disturb to make free election." 2 Inst. 168,

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(a) *Vide* 1 Bl. Com. 88.

HOLT, C. J. 169. And this statute, as my Lord *Coke* observes, is only an enforcement of the common law ; and if the parliament thought the freedom of elections to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free ; it is a violation of that statute to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable.

And I am of opinion, that this action on the case is a proper action. My brother *Powell* indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff ; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary ; for *a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.* As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage : for it is an invasion of his property, and the other has no right to come there ; and in these cases the action is brought *vi et armis*. But for invasion of another's franchise trespass *vi et armis* does not lie, but an action of trespass on the case ; as where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions : for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance, every man shall have his action, as is

agreed in *Williams' Case*, 5 Co. 73. a. ; and *Westbury* and *HOLT*, C. J. *Powell*, Co. Lit. 56. a. *Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action ; for in that case the law will not multiply actions.* But it is otherwise when one man only is offended by that act, he shall have his action ; as if a man dig a pit in a common, every commoner shall have an action on the case *per quod communiam suam in tam amplo modo habere non potuit* ; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway ; every passenger shall not bring his action, but the (a) party shall be punished by indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of *Turner v. Sterling*, the plaintiff was not elected ; he could not give in evidence the loss of his place as a damage, for he was never in it ; but the gist of the action is, that the plaintiff having a right to stand for the place, and it being difficult to determine who had the majority, he had therefore a right to demand a poll, and the defendant, by denying it, was liable to an action. If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences. So the case of *Hunt and Dowman*, 2 Cro. 478, where an action on the case is brought by him in reversion against lessee for years for refusing to let him enter into the house, to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be supposed.

(a) Vide
[Raym.] 486.

But in the principal case, my brother says we cannot judge of this matter, because it is a parliamentary thing. O ! by all means, be very tender of that. Besides, it is intricate, that there may be contrariety of opinions. But this matter can never come in question in parliament, for it is agreed that the persons for whom the plaintiff voted

HOLT, C. J. . . . were elected, so that the action is brought for being deprived of his vote; and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people: but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us, without encroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

My brother *Powell* says, that the plaintiff's right of voting ought first to have been determined in parliament, and to that purpose cites the opinion of my Lord *Hobart*, 318, that the patron may bring his action upon the case against the ordinary after a judgment for him in a *quare impedit*, but not before. It is indeed a fine opinion, but I do not know whether it will bear debating, and how it will prove, when it comes to be handled. For at common law the patron had no remedy for damages against the disturber, but the statute 13 Ed. 1, st. 1, c. 5, s. 3, gives him damages; but if he will not make the bishop a party to the suit, he has lost his remedy which the statute gives him. But in our case the plaintiff has no opportunity to have remedy elsewhere. My brother *Powys* has cited the opinion of *Littleton* on the statute of Merton, that no action lay upon the words, "*si parentes conquerantur*,"

because none had ever been brought, yet he cannot depend upon it. Indeed, that is an argument, when it is founded upon reason, but it is none when it is against reason. But I will consider the opinion. Some question had arisen on the opening of that statute on those words, "*si parentes conquerantur*," &c., what was the meaning of them, whether they meant a complaint in a court in a judicial manner.† But it (a) is plain the word "*conquerantur*" means only "*si parentes lamententur*," that is, only a complaint *in pais*, and not in a court: for the guardian in socage shall enter in that case, and shall have a special writ *de ejectione custodiæ terræ et hæredis*. But this saying has no great force; if it had, it would have been destructive of many new actions, which are at this day held to be good law. The case of *Hunt and Dowman*, before mentioned, was the first action of that nature: but it was grounded on the common reason and the ancient justice of the law. So the case of *Turner and Sterling*. Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio, ibi idem jus*. This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections; but we must not be frightened when a matter of property comes before us, by saying it belongs to the parliament; we must exert the queen's jurisdiction. My opinion is founded on the law of England. The case of *Mors and Slue*, 1 Vent. 190, 238, was the first action of that nature: but the novelty of it was no objection to it. So the case of *Smith and Grashaw*, 1 Cro. 15, W. Jones, 93, that an action of the case lay for falsely and maliciously indicting the plaintiff for treason though the objections were strong against it, yet it was adjudged, that if the prosecution were without probable cause, there was as much reason the action should be maintained as in other cases. So 15 Car. 2 C. B., between *Bodily and Long*, it was adjudged by *Bridgman*, Chief

HOLT, C. J.

† That usage may explain the meaning of an ancient statute, see *Rez v. Scot*, 3 T. R. 604; *Sheppard v. Gosnold*, Vaugh. 169. *Dunbar v. Roxburgh*, 3 Cl. & Fin. 335; [*The Montrose Peerage* case, 1 Macqueen, H. of L. 401.] In *Bank of England v. Anderson*, 3 Bing N. C. 666, per Tindal, C. J.—“We attribute great weight to that maxim of law, *contemporanea expositio fortissima est in lege*.” And this is said with reference to a statute no older than 5 & 6 W. & M. [See *Broom's Legal Maxims*, 3d ed. 608, *et seq.*] (a) *Vide Litt.* 108.

HOLT, C. J. Justice, &c., that an action on the case lay for a riding whenever the plaintiff and his wife fought, for it was a scandalous and reproachful thing. So in the case of *Herring* and *Finch*, 2 Lev. 250, nobody scrupled but that the action well lay, for the plaintiff was thereby deprived of his right. And if an action is maintainable against an officer for hindering the plaintiff from voting for a mayor of a corporation, who cannot bind him in his liberty nor estate, to say that yet this action will not lie in our case, for hindering the plaintiff to vote at an election of his representative in parliament, is inconsistent. Therefore, my opinion is, that the plaintiff ought to have judgment.

(a). *Vide* 1 Bro.
Parl. Cas. 45.

Friday, the 14th of January, 1703, this (a) judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen. *Trevor*, Chief Justice, and Baron *Price* were of opinion with the three judges of the King's Bench. *Ward*, C. B., and *Bury* and *Smith*, barons, were of opinion with the Lord Chief Justice *Holt*, *Tracy dubitante*, *Nevill* and *Blencowe* absent.

(Note.—I had it from good hands, that *Tracy* agreed clearly that the action lay, but was doubtful upon the manner of laying the declaration.)

Upon the arguments of this case, *Holt*, Chief Justice, said, the plaintiff has a particular right vested in him to vote. Is it not then a wrong, and an injury to that right, to refuse to receive his vote? So if a borough has a right of common, and the freemen are hindered from enjoying it by inclosure and the like, every freeman may maintain his action. This action is brought by the plaintiff, for the infringement of his franchise. You would have nothing to be a damage, but what is pecuniary, and a damage to property. If a man has *retorna brevium*, although no fees were due to him at common law, yet if the sheriff enters within his liberty, and executes process there, it is an invasion of his franchise, and he may bring his action; and there is the same reason in this case. Although this matter relates to the parliament, yet it is

an injury precedaneous to the parliament, as my Lord HOLT, C. J. *Hale* said in the case of *Bernardiston v. Soame*, 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it : they cannot make him a recompense. Let all people come in, and vote fairly : it is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him pay well for it ; it is denying him his English right : and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make.

Ashby v. White is usually cited to exemplify that maxim of the law, *ubi jus ibi remedium* ; a maxim which has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case. For the statute of Westminster 2, 13 Edw. 1, c. 24, which was only in affirmation of the common law on this subject, and was passed to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, enacted, that "whensoever from thenceforth a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one ; and, if they cannot agree, it shall be adjourned till the next parliament, where a writ shall be framed by

consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." Accordingly the courts have always held that the novelty of the particular complaint alleged in an action on the case, is no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Thus, in *Chapman v. Pickersgill*, 2 Wilson, 146, which was an action for falsely and maliciously suing out a commission of bankruptcy, Pratt, C. J., in answer to the objection that the action was of a novel description, said, that, "this had been urged in *Ashby v. White*, but he did not wish ever to hear it again. This was an action for a *tort* ; *torts* were infinitely various, for there was not anything in nature that might not be converted into an instrument of mischief." So in

Pasley v. Freeman, 3 T. R. 63, per Ashurst, J.: "Another argument which has been made use of, is, that this is a new case, and that there is no precedent of such an action. Where cases are new *in their principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new *in the instance*, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one fourth part of the cases that are to be found in them." In *Winsmore v. Greenbank*, Willes, 577, the declaration stated that the plaintiff's wife unlawfully, and against his consent, went away and absented herself from him, and that during her absence a large estate was devised to her separate use; that she thereupon became desirous of being reconciled and cohabiting with her husband, but that the defendant persuaded and enticed her to continue apart till her death, which she did; whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profit and advantage of her fortune. On motion in arrest of judgment it was objected that the action

was unprecedented; but Willes, C. J., said "that the form of action on the case was introduced for this reason, that the law would never suffer an injury and a damage without a remedy, and that there must be new facts in every special action on the case." Numerous other instances might here be cited, but this in so clear a matter seems unnecessary. See the judgment in *Langridge v. Levy*, 2 M. & W. 519.

The class of cases from which it is important to distinguish *Ashby v. White*, &c., are those in which a damage is incurred by the plaintiff, but a damage not occasioned by anything which the law esteems an injury. In such cases as these he is said to suffer *damnum sine injuriâ*, and can maintain no action. Thus, in the case of *Pryce v. Belcher*, reported on demurrer, 3 C. B. 58, and afterwards on a motion to enter a verdict for the plaintiff, 4 C. B. 866, which presents some features of resemblance to *Ashby v. White*, it appeared that Mr. Pryce, who was registered as a voter for the borough of Abingdon, but who, in consequence of non-residence, had by the effect of 6 & 7 Vict. c. 18, s. 79, in fact lost the right to vote, had notwithstanding tendered his vote at an election for the borough; whereupon Mr. Belcher, the returning officer, exceeding the limits of his duty, which, by 6 & 7 Vict. c. 18 [s. 81,] was confined to putting the questions as to the identity of the voter, and whether

he had voted before at the election, wilfully, but not maliciously, instituted an inquiry into Mr. Pryce's right to vote, and upon his appearing not to be duly qualified in point of residence, refused to receive the vote except as *tendered*, and did not include or reckon it amongst the votes given for the candidate for whom Mr. Pryce desired to vote. An action upon the case was thereupon brought by Mr. Pryce, in which he declared in one count for the refusal to permit him to vote, in another for the omission of his vote in the account of the poll, and in a third for the unauthorised scrutiny and decision upon his right to vote whereby, as he alleged, he was delayed and hindered in the exercise of his right; all which counts were holden to present good *prima facie* causes of action, 3 C. B. 58. But it was finally decided that the plaintiff could not maintain his action, on the ground stated in the judgment, "that although a party in the situation of the plaintiff has the *power* to compel the returning officer, under the apprehension of a prosecution, to put his name upon the poll, he has not the *right* to do so; [that in doing so he is acting in direct contravention of the act of parliament, the terms of which are express 'that he shall not be entitled to vote;'] and that the rejection of his vote cannot amount to a violation of anything which the law can con-

sider as his right. The foundation of the plaintiff's action is the injury to his right; but we are of opinion, for the reason above given, that he has *no right*, and, consequently, that he has suffered *no injury*." [4 C. B. 866.]

More striking instances of *damnum absque injuria* occur in legal proceedings, instituted for the *bonâ fide* purpose of asserting some supposed right, or prosecuting a criminal charge, which however in the event proves groundless. In such cases, in order, it should seem, to facilitate the administration of justice, it is established that unless there be both malice *and* an absence of reasonable and probable cause, the person against whom the proceedings are taken has no legal ground of action. See the note (c) to *Skinner v. Gunton*, 1 Wms. Saund. 230 *a*; and for modern instances see *Gibbs v. Pike*, 9 M. & W. 351, where one who, without malice, had registered under 1 & 2 Vict. c. 110, an order which, as he contended, had the effect of a judgment, was holden justified, without regard to whether it had that effect, or was properly registered or not; *Davies v. Jenkins*, 11 M. & W. 745, where an attorney, by mistake, sued to judgment and execution a person of the same name as the intended defendant; *De Medina v. Grove*, 10 Q. B. 152, since affirmed [Ib. 172], where a judgment debtor was taken in exe-

cution for more than was due on the judgment (*secus* where the amount is agreed, *Wentworth v. Bullen*, 9 B. & C. 840); *Churchill v. Siggers*, 3 E. & B. 929; [*Jennings v. Florence*, 2 C. B. N. S. 467,] where there was malice and want of probable cause, with damage; *Roret v. Lewis*, [5 D. & L. 371,] where a person privileged from arrest was nevertheless arrested through malice, but not without reasonable or probable cause; [where the party arrested had not obtained an order for his discharge, *Gilding v. Eyre*, 10 C. B. N. S. 592; S. C. 31 L. J. C. P. 175; and *Phillips v. Naylor*, 4 H. & N. 565; as to the effect of such judgment as that in *De Medina v. Grove*, see *Kelly v. Lawrence*, 3 H. & C. 1. An unreversed judgment raises a necessary presumption that the proceedings to obtain it were instituted with reasonable and probable cause, *Barber v. Lessiter*, 7 C. B. N. S. 175; *Castrique v. Behrens*, 23rd February, 1861, 30 L. J. Q. B. 163; therefore in an action for a malicious prosecution the declaration must show that the proceedings terminated in favour of the plaintiff; and for the same reason an action will not lie for a conspiracy to make it appear that the plaintiff was guilty of an offence, if he was subsequently convicted of the offence, and the conviction continues in force, *Barber v. Lessiter*. But the success of *ex parte* proceedings, wherein the person

proceeded against is not entitled to be heard in his own defence, for instance, to obtain sureties for the peace, does not show that there was reasonable and probable cause for taking these proceedings, *Steward v. Grommett*, 7 C. B. N. S. 191. As to how far the question of reasonable and probable cause is for the judge, and how far for the jury, see *Douglas v. Corbett*, 6 E. & B. 511; *Hailes v. Marks*, 7 H. & N. 56; 30 L. J. Exch. 389.]

The immunity of certain privileged or confidential statements defamatory of third persons, on the ground that they are made *bonâ fide* in the assertion of a right, or the performance of a duty, [*Whiteley v. Adams*, 15 C. B. N. S. 392; 33 L. J. C. P. 89; *Cowles v. Potts*, 34 L. J. Q. B. 247,] or that they are fair criticism upon matter of public interest, [*Campbell v. Spottiswood*, 32 L. J. Q. B. 185,] furnishes another head of *damnum absque injuriâ*. In such cases, generally speaking, however harsh, hasty, or untrue may be the language employed, so long as it is honestly believed by the speaker or writer to be true, it does not furnish a legal ground of action. See *Dodd v. Hawkins*, 8 C. & P. 88, *per* Alderson, B. [*Huntley v. Ward*, 6 C. B. N. S. 514, *per* Willes, J., and the definition of privileged communications given in *Harrison v. Bush*, 5 E. & B. 348.] The extent and application of this doc-

trine have lately given rise to much discussion and difference of opinion. See *Coxhead v. Richards*, 2 C. B. 569; *Blackburn v. Pugh*, Ib. 611; *Bennett v. Deacon*, Ib. 628; *Gathercole v. Miall*, 15 M. & W. 319; *Somerville v. Hawkins*, 10 C. B. 583; *Taylor v. Hawkins*, 16 Q. B. 308; *Harris v. Thompson*, 13 C. B. 333; [*Manby v. Witt*, 18 C. B. 544; *Beatson v. Skene*, 5 H. & N. 838; S. C. 29 L. J. Exch. 430; *Bell v. Parker*, 10 Irish C. L. R. 279; *Croft v. Stevens*, 7 H. & N. 570. As to reports of proceedings in public courts, see *Lewis v. Levy*, E. B. & E. 537; *Brook v. Evans*, 6 Jur. N. S. 1025, 29 L. J. Cha. 669; *Popham v. Pickburn*, 7 H. & N. 891. Words pertinent to the matter in issue, and spoken by counsel, or by an attorney acting as advocate, in the course of a judicial proceeding, are privileged: *Mackay v. Ford*, 5 H. & N. 792. So are words spoken with reasonable and probable cause by a coroner addressing a jury, *Thomas v. Churton*, 2 B. & S. 475; 31 L. J. Q. B. 139. An action will not lie against a witness merely for defamation, or for perjury either in giving his evidence, or in an affidavit in a cause, *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, Cam. Scac. 4 H. & N. 569; though such perjury may go to make up a liability, as in *Fitzjohn v. Mackinder*, Cam. Scac. 9 C. B. N. S. 505; 30 L. J. C. P. 257, where in a

County Court the defendant's perjury and forgery, and the unsatisfactory manner of the plaintiff, induced the judge to commit the latter for perjury, and to bind over the defendant to prosecute; and an indictment having accordingly been preferred by the defendant, he was, on the plaintiff's acquittal, held liable to an action by the latter for a malicious prosecution. For another instance of the like kind, see *Farley v. Danks*, 4 E. & B. 493, where the defendant was held liable for having falsely, &c., caused the plaintiff to be adjudged a bankrupt, by false depositions, which, even if true, would not have supported the adjudication.]

Acts done by way of self-defence against a common enemy, such as the erection of banks to prevent the inroads of the sea, fall within the same rule, and damage resulting therefrom is not actionable, *Rex v. Pagham*, 8 B. & C. 355; 2 Man. & R. 468; S. C.; *per curiam*, *Scott v. Shepherd*, 2 Blackstone, 892, set forth post. Instances might be multiplied in which wrongs the most grievous are without legal redress. The seduction of a daughter not in her father's service, actual or constructive, *Blaymire v. Haley*, 6 M. & W. 55; *Davies v. Williams*, 10 Q. B. 725; [*Manley v. Field*, 7 C. B. N. S. 96; *Thompson v. Ross*, 5 H. & N. 16; S. C. 29 L. J. Exch.; *Rist v. Faux*, Cam. Scac. 4 B. & S. 409; 32 L. J.

Q. B. 386;] even though the father be thereby forced to maintain her, *Grinnell v. Wells*, 8 Scott, N. R. 741; 7 M. & G. 1033, S. C.; the seduction of a daughter in her father's service, unless an actual loss of service accrue, *Eager v. Grimwood*, 1 Exch. 61 (*quod mirum*), are *damna absque injuriâ*. So before the modern act of parliament, 9 & 10 Vict. c. 93, "for compensating the families of persons killed by accidents, no action at law was maintainable against a person who, by his wrongful act, neglect, or default, might have caused the death of another, though under circumstances which would have given the sufferer a right of action had he survived; and the husband, wife, parent, or children of the deceased were without remedy against the wrong-doer, by whom they had been deprived of comfort and support. And that statute itself only gives compensation for the pecuniary [damage] sustained, *Blake v. Midland Rail. Co.*, 18 Q. B. 93; [*Dalton v. South-Eastern Rail. Co.*, 4 C. B. N. S. 296; *Chapman v. Rothwell*, E. B. & E. 168; S. C. 27 L. J. Q. B. 315; *Duckworth v. Johnson*, 4 H. & N. 653; S. C. 29 L. J. Exch. 25, including the loss of such pecuniary advantage as might reasonably have been expected to be derived from the person killed if he had continued alive, *Pym v. The Great Northern Rail. Co.*, Cam. Scac. 4 B. & S. 396; 32 L. J. Q. B. 377;

but not funeral expenses or mourning, *Franklin v. The South-Eastern Rail. Co.*, 3 H. & N. 21.]

The case of the school set up near another school, reported H. 11 H. 4, fo. 47, pl. 21, is one of the earliest on the subject of damage without legal cause of action, and possesses much interest: and others are referred to in Comyn's Digest, titles *Action upon the case* (B), and *Action upon the case for a nuisance* (C), in which serious damages, even actual nuisances, have been holden not actionable, as being either not temporal injuries, or only such as must be expected to result from the reasonable exercise of legal rights. Thus, if a man establish an offensive trade near my dwelling-house, so as to render it uncomfortable, I may maintain an action on the case against him for a nuisance, for here is *damnum* coupled with *injuriâ*, [*Bamford v. Turnley*, Cam. Scac. 3 B. & S. 66; S. C. 31 L. J. 286; see *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 208; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160; S. C. 31 L. J. Exch. 9; *Wanstead Local Board of Health v. Hill*, 13 C. B. N. S. 479; 32 L. J. M. C. 135.] But if I build my house near his premises, at all events if they have been so used for twenty years, the case is altered; and, although I have *damnum*, yet I shall maintain no action, since it is not coupled with what the law considers *injuriâ*. Such, too, it

was once thought might be the law, even if the new-comer had built within the twenty years, since otherwise a man setting up an offensive trade even in the remotest spot might be ruined by the first person who chose to come and dwell near him within twenty years. In *Bliss v. Hall*, 4 Bing. N. C. 185, some expressions however dropped from the court from which it may be thought that their lordships' opinion was that nothing but a twenty years' user will entitle a man to carry on an offensive trade without interruption. The point was not however necessary for the decision of that case or that of *Elliotson v. Feetham* [2 Bing. N. C. 134], on the authority of which it was decided. In those cases to an action for a nuisance to plaintiff's dwelling-house, a plea that the noisome trade was established *before the plaintiff became possessed of the dwelling-house*, was held bad. *Non constat* however what would have been the decision had the plea alleged that the defendant carried on the trade there *before the building of the plaintiff's house*. See *Flight v. Thomas*, 10 A. & E. 590; [and *Hole v. Barlow*, 4 C. B. N. S. 334; 27 L. J. C. P. 207.

On the same principle—*viz.*, that *damage*, to sustain an action, must be coupled with *injury*—if A. build a house on the edge of his land, and the proprietor of the adjoining land, after twenty years, dig so near it that it fall down, an

action on the case lies, because the plaintiff has, by twenty years' use, acquired [by prescription a] right to the support, and to infringe that right was an injury, *Stansell v. Jollard*, Selw. N. P. 444. See *Harris v. Ryding*, 5 M. & W. 60; *Hide v. Thornborough*, 2 Car. & K. 250; [*Brown v. Robins*, 4 H. & N. 186; *Bonomi v. Backhouse*, E. B. & B. 622, 646, affirmed in Dom. Proc. 34 L. J. Q. B. 181; and *Rowbotham v. Wilson*, Dom. Proc. 8 Ho. of Lords Cases, 347; S. C. 30 L. J. Q. B. 49.] But it is otherwise if the owner of land adjoining a newly-built house dig in a similar manner and produce similar results, for there, though there is *damage*, yet, as there is no right to support, there is no *injury* committed by withdrawing it, and therefore no action maintainable, *Partridge v. Scott*, 3 M. & W. 220; *Wyatt v. Harrison*, 3 B. & Ad. 871. But then the person digging must not do so *negligently*, otherwise he is liable to action. See *Dodd v. Holme*, 1 A. & E. 493; *Grocers' Co. v. Donne*, 3 Bing. N. C. 34; *Trower v. Chadwick*, 3 Bing. N. C. 334, and the same case reversed in C. S. 6 Bing. N. C. 1; *Davis v. London and Blackwall Rail.*, 1 M. & Gr. 799, 2 Sc. N. R. 72, S. C.; *Bradbee v. Mayor of London*, 5 Scott, N. R. 79, 4 M. & Gr. 714, 2 Dowl. N. S. 164, S. C.; [*Bibby v. Carter*, 4 H. & N. 153; and the action will lie if the weight of the house did not occasion or contri-

bute to the subsidence; see *Brown v. Robins*, 3 H. & N. 176; *Horner v. Knowles*, 6 H. & N. 454; S. C. 30 L. J. Exch. 102; *Berkeley v. Shafto*, 15 C. B. N. S. 79; as to the pleadings, *Jeffries v. Williams*, 5 Exch. 792; *Rogers v. Taylor*, 27 L. J. Exch. 173; and as to the right to have one house supported by another, *Solomon v. Vintners' Co.*, 4 H. & N. 586.] The maxim which governs such cases is *sic utere tuo ut alienum ne lædas*. [*Bonomi v. Backhouse*, *supra*; and see the elaborate judgment of Blackburn, J., in *Fletcher v. Rylands*, 35 L. J. Exch. 154.] Therefore A. may be sued for so negligently erecting a hayrick on the edge of his land that it ignites and burns his neighbour's house, *Vaughan v. Menlove*, 3 Bing. N. C. 468; notwithstanding 6 Anne, c. 31, and 14 Geo. 3, c. 78, which do not, it seems, apply to fires traceable to negligence. See the observations of Lord Lyndhurst in *Viscount Canterbury v. The Attorney-General*, 1 Phillips, 306, and *Filliter v. Phippard*, 11 Q. B. 347, where the subject of liability for damage by fire was discussed; [and see *Exp. Gorely*, 34 L. J. Ba. 1; and *Fletcher v. Rylands*, 3 H. & C. 774; S. C. 34 L. J. Exch. 177.] For examples of the general rule in cases of fire caused by railway engines, see *Aldridge v. The Great Western Rail.*, 3 M. & Gr. 515, 4 Scott, N. R. 156, 1 Dowl. N. S. 247, S. C.; *Piggott v. The Eastern Counties Rail.*, 3 C. B. 229; [*Vaughan v. The Taff Vale Rail. Co.*, Cam. Scac. 5 H. & N. 679; S. C. 29 L. J. Exch. 247; *Freemantle v. The London and South-Western Rail. Co.*, 10 C. B. N. S. 89; 31 L. J. C. P. 12.] And as to the liability of a gas company for an explosion caused by the escape of gas through a stop-cock over which they had no control, see *Holden v. The Liverpool Gas Co.*, 3 C. B. 4; [*Blenkiron v. The Great Central Gas Consumers' Co.*, 2 F. & F. 437; and *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781, where a water company was held not liable for the escape of water from their pipes owing to an extraordinary frost; but see *Great Western Rail. Co. Canada v. Braid*, 1 Moore N. S. 101.] But it is settled by *Chadwick v. Trower*, in Cam. Scac. 6 Bing. N. C. 1, that even supposing that an action could be brought for the mere omission to take care while pulling down one's own property that a neighbour's property should not be injured, still the duty to take such care does not extend to cases where the defendant is not shown to have had notice of the existence or nature of the property injured, as where it was a vault. In consequence of this decision it will probably become usual in actions of this sort to traverse notice of the nature or existence of the property; [see *The Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759; 33 L. J. C.

P. 139.] Very similar to the case of a man digging on the extremity of his own land is that of one digging on his own close, so as to divert the underground stream, or drain the well of a neighbour. This, in the absence of some special right to such stream or well, is *damnum absque injuriâ*, [*Chasemore v. Richards*, 7 H. of Lords' Cases, 349; S. C. 29 L. J. Exch. 81;] *Acton v. Blundell*, 12 M. & W. 324; see *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; [*New River Co. v. Johnson*, 6 Jurist, N. S. 374; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramsbotham*, Ib. 602; and *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J. Q. B., 331.]

The mode of determining whether damage have or have not been occasioned by what the law esteems an *injury*, is to consider *whether any right existing in the party damnified have been infringed upon; for if so, the infringement thereof is an injury*: and if an injury be shown, the law will presume that some damage resulted from it. See *Banker v. Green*, 2 Bing. 317, 3 [Sampson v. Hoddinnott, 1 C. B. N. S. 590.] And an action is maintainable against one who makes a projection over the land of another, before any rain falls so as to cause damage, *Fay v. Prentice*, 1 C. B. 828. To use Lord Holt's words in the present case:—"Every injury to a right imports a damage in the nature of

it, though there be no pecuniary loss;" for instance, a creditor who is ascertained to be such by a judgment, and has charged his debtor in execution, has a right to the body of his debtor every hour till the debt is paid. *Per Buller, J.*, 5 T. R. 40. He has a *right to have the body in gaol*, and the escape of a debtor for ever so short a time is necessarily a damage to him, and an action for an escape lies. *Per Parke, B.*, 4 M. & W. 153. *Clifton v. Hooper*, 6 Q. B. 468. But where a defendant is in custody on mesne process and after the return of the writ by which he was captured, the plaintiff's right is "*to have the defendant in custody whenever he chooses to remove or declare against him*;" and, therefore, although an escape which delayed the execution of a habeas corpus or the delivery of a declaration would be actionable, yet an escape involving neither of those consequences is not so, *Williams v. Mostyn*, 4 M. & W. 145; *Planck v. Anderson*, 5 T. R. 37. [Upon the same principle an action will not lie against the sheriff for a false return to a writ of execution, if the plaintiff has not suffered actual damage in consequence of the false return, *Wylie v. Birch*, 4 Q. B. 566; *Levy v. Hale*, 29 L. J. C. P. 127.] So, if a landlord distrain for more rent than is due, an action does not lie against him if the goods he take be of less value than the rent actually due,

Leyland v. Tancred, 16 Q. B. 664; *Coles v. Bank of England*, 10 A. & E. 437; *Morrill v. Stanley*, 1 M. & G. 568; [and *Caswell v. Worth*, 5 E. & B. 849, where the

defendants were bound by statute to keep their machinery fenced, but omitted so to do, yet they were held not to be liable to the plaintiff for an injury which he received from the machinery by setting it in motion, contrary to their orders, and with knowledge that it could not be used with safety. *Contrà* where he was guilty of no misconduct, though he knew of the danger, *Holmes v. Clarke*, 6 H. & N. 349.] However, where a man carelessly left his cart and horse unattended in the street, and a young child climbed into it and had a severe fall, the horse being led forward by a boy, the owner was held responsible in case, seemingly on the ground that having thrown temptation in the child's way he could not be allowed to object that it had yielded to it: *Lynch v. Nurdén*, 1 Q. B. 29; but see, as to that case, *Lygo v. Newbold*, 9 Exch. 302; [*Singleton v. Eastern Counties Rail. Co.*, 7 C. B. N. S. 287; *Mangan v. Atherton*, 35 L. J. Exch. 161; and *Abbott v. Macfie*, 2 H. & Colt. 744; S. C. 33 L. J. Exch. 177;] and the rule is not that any negligence on the plaintiff's part will preclude him from recovering; but, that though there has been negligence on the plaintiff's part, still he may recover, unless he could by ordinary care have

There are, indeed, certain cases in which an act may be in law an injury, and may produce damage to an individual, and yet in which the law affords no remedy, or, at least, no immediate one. These are, cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In such a case the mode of punishing the wrong-doer is by indictment, and by indictment only. 1 Inst. 56. a. [See *Ricketts v. Metropolitan Rail. Co.*, 5 B. & S. 149; 34 L. J. Q. B. 261.] Still, if any person have sustained a particular damage therefrom, beyond that of his fellow-citizens, he may maintain an action in respect of that particular damnification. Thus, to use the familiar instance put by the text-writers, if A. dig a trench across the highway, this is the subject of an indictment; but if B. fall into it, then the particular damage thus sustained by him will support an action. Still, this exception is subject to qualification, for the damage must not be occasioned by want of ordinary skill and care on the part of the plaintiff, *Butterfield v. Forrester*, 11 East, 60; *Flower v. Adam*, 2 Taunt. 314; *Bridge v. Grand Junction Co.*, 3 M. & W. 244 (which see as to the form of plea in such a case). *Hawkins v. Cooper*, 8 C. & P. 473;

avoided the consequence of the defendant's negligence. Therefore, a man who had improperly left an ass fettered on the highway, was nevertheless held entitled to recover against one who negligently drove against it, *Davies v. Mann*, 10 M. & W. 546; [and the owner of a barge which, while sailing down the Thames, was negligently run into by a steamer, was held entitled to recover against the pilot of the steamer, who might easily have avoided her, although (contrary to the 17 & 18 Vict. c. 104, sect. 296), the helm of the barge was not ported on the approach of the steamer, and nobody on board the barge was keeping a look-out, *Tuff v. Warman*, 2 C. B. N. S. 740; Exch. Cham. 5 C. B. N. S. 573. "In some cases," said Lord Campbell, C. J., in *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 195, "there may have been negligence on the part of a plaintiff, remotely connected with the accident; and in those cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted *donkey case*, *Davies v. Mann*. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject;

and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss;" and see *The Netherlands Steamboat Co. v. Styles*, 9 Moore, Priv. C. C. 286; *Smith v. Dobson*, 3 M. & Gr. 59; and *Mayor of Colchester v. Brooke*, 7 Q. B. 339, where oysters were placed in the channel of a public navigable river so as to create a public nuisance, yet, a person navigating the river was holden not justified in running his vessel against them, when he had room to pass without so doing; [quære the effect upon this case of the judgments in *Gann v. Whitstable*, 11 House of L. 192; 35 L. J. C. P. 29;] *Dimes v. Petley*, 15 Q. B. 276; [*Bateman v. Bluck*, 18 Q. B. 870; *Witherby v. Regent's, &c., Co.*, 12 C. B. N. S. 1; *Eastern Counties Rail. Co. v. Dorling*, 5 C. B. N. S. 821, where the defendant was held entitled to pass over a dummy which the plaintiffs had so placed as to obstruct his right to land passengers on a certain quay. If a way is made dangerous by an obstruction, and a person being to some extent aware of the danger, yet risks it, and is injured, he may still maintain an action for the injury, unless the danger was so obvious that it was against common prudence to encounter it, *Clayards v. Dethick*, 12 Q. B. 439; and

see *Thompson v. North-Eastern Rail. Co.*, Cam. Scac. 2 B. & S. 106; 31 L. J. Q. B. 194; *Holmes v. Clark*, 6 H. & N. 349; S. C. 31 L. J. Exch. 356, Cam. Scac.; *Wyatt v. The Great Western Rail. Co.*, 34 L. J. Q. B. 204.] In *Bridge v. Grand Junction Rail.*, *supra*, in an action at the suit of a passenger by the train of a railway company against another railway company, with a train of which a collision had taken place, whereby the passenger had sustained injury, the defendants pleaded that the injury was caused in part by the negligence of the person who had the management of the train in which the plaintiff was riding. The plea was holden bad in substance, for not showing, that by ordinary care on the part of the person managing the train in which the plaintiff was, the collision might have been avoided. A hasty perusal of the report of that case might lead to the supposition that, according to the opinion of the court, the plea might have been made good in substance, though not in form, by an averment that the plaintiff's driver could by ordinary care have avoided the accident; but that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may, perhaps, be considered that the plea was at all events bad in substance, for not alleging that the passenger who brought the action was guilty of negligence. If two drunken stage-coachmen were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury to his own carriage, no doubt, but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood v. Bryan*, 8 C. B. 115; but it may be questioned whether the reasoning of the court in that case is consistent with those of *Rigby v. Hewitt*, 5 Exch. 240; and *Greenland v. Chaplin*, 5 Exch. 243; or with the series of decisions from *Quarman v. Burnett*, 6 M. & W. 499; to *Reedie v. London and North-Western Rail. Co.* 4 Exch. 244; [*Dayrell v. Tyrer*, 28 L. J. Q. B. 52; and *The Milan*, 31 L. J. Prob. Mat. & Adm., where Dr. Lushington declined to act on *Thorogood v. Bryan*.] Why in this particular case both the wrongdoers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood v. Bryan*. [See *Waite v. North-Eastern Rail. Co.*, E. B. & E. 719.] It has been questioned

whether the doctrine of contributory negligence applies to the case of tort in the execution of a contract, *Martin v. The Great Northern Rail. Co.*, 16 C. B. 179. [But see, *per* Lord Campbell, C. J., in *Waite v. North-Eastern Rail. Co.* In that case, a child about five years old was taken by his grandmother to a railway station, where she got tickets for herself and him for a train, to get to which it was necessary to cross the line of railway. In crossing the line with the child about a quarter of an hour before the train was due, she was killed, and the child was injured by another train. These disasters were caused both by the neglect of the railway company to give her warning of the danger, and by her own negligence. The child brought an action against the company for the hurt which he had suffered, but the action was held not to be maintainable on two grounds: namely, that the grandmother was the contracting party in respect of the tickets, and had undertaken to take due care of the child, and that the child was identified with her in respect of the negligence on her part which had contributed to the accident.]

— And though the damage and wrong be excessive, and peculiarly concern an individual, still, if it amount to a felony, the private remedy is suspended until public justice shall have been satisfied; a very wholesome rule, and tending to prevent the composition of

felonies under the pretence of seeking remedy by action. [The latest, and in some respects most remarkable, application of this rule occurred in *Wellock v. Constantine*, 32 L. J. Exch. 285, where a servant girl brought an action of assault against her master, and having proved a rape, for which he had not been prosecuted, was nonsuited, and his non-suit was upheld by the Exchequer: dissentiente, *Martin, B.*] This rule, however, does not apply to actions against others than the person guilty of the felony, *White v. Spettigue*, 13 M. & W. 603; [*Lee v. Bayes*, 18 C. B. 599.] And the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents, whilst it recognises the general rule, expressly enacts that it shall not apply to actions brought pursuant to its provisions. See Com. Dig. *Action on the Case* (B. 5).

Again, there are some cases in which a damage is sustained by one man in consequence of the act of another, which act would be considered tortious by the law if the damage incurred could be properly deduced from it; but which, nevertheless, is dispensable, because the damage actually incurred is, to use the legal phrase, too *remote* to be the subject-matter of an action; in other words, because it is not the natural consequence of the act committed by the defendant. [Thus, if the plaintiff is made ill

and put to medical expense by the defendant's slander of him by words not actionable *per se*, that will not be sufficient special damage to support an action for the slander, *Allsop v. Allsop*, 5 H. & N. 534; see also *Richardson v. Dunn*, 8 C. B. N. S. 655; *Parkinson v. Scott*, 1 H. & C. 153; S. C. 31 L. J. Exch. 331;] Com. Dig. *Action on Case for Defamation*; and *Kelly v. Par-
tington*, 5 B. & Ad. 645. And it has been thought that damage must always be considered too remote when it proceeds from the illegal act of a third person, for that the law will not esteem it natural that an illegal act should be induced by any consideration. Thus, if A. falsely assert that B. has spoken in disparagement of C., in consequence of which C. ceased to befriend and invite B., an action would be maintainable; see *Moore v. Meagher*, 1 Taunt. 39; but if C. were in consequence to beat B., no action could be maintained by him against A. on account of the damage sustained from the beating. So in *Vicars v. Wilcox*, 8 East, 1, where the defendant accused the plaintiff of unlawfully cutting his (the defendant's) cord, in consequence of which J. O. dismissed plaintiff from his service before the expiration of his year, Lord Ellenborough said, "that the special damage must be the *legal and natural* consequence of the words spoken; and here it

was an *illegal* consequence, a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had seized the plaintiff and thrown him into a horsepond for his supposed transgression." See *Morris v. Langdale*, 2 B. & P. 284; *Knight v. Gibbs*, 1 A. & E. 43; *Ashley v. Harrison*, 1 Esp. 48; *Ward v. Weeks*, 4 M. & P. 796; [*Dixon v. Smith*, 5 H. & N. 540; *Parkinson v. Scott*. 1 H. & C. 153; 31 L. J. Exch. 331.] This doctrine, however, has been questioned: see *Green v. Button*, 2 C. M. & R. 707; *Kendillon v. Maltby*, 1 Car. & M. 402, Lord Denman, C. J.; *Haddon v. Lott* [15 C. B. 411]; Sedgwick on Damages, 66, and 1 Stark. on Libel, 205, and the notes to *Vicars v. Wilcox*, *post*, vol. ii.

This note would not be complete without a reference to the modern case of *Lumley v. Gye*, [2 E. & B. 216,] in which it was held by the majority of the Court of Queen's Bench (Coleridge, J., dissenting,) that an action was maintainable for maliciously causing and procuring one of two contracting parties not to perform the contract, whereby loss accrued to the other. This case, not having been one of master and servant, was of the first impression, and inasmuch as by reason of the defendant having obtained a verdict, it became unnecessary to take the opinion of a Court of

Error, such a question may, when it next arises, be considered fit to undergo further discussion. See the very learned and elaborate judgment of Coleridge, J., as to the origin of the action for seducing servants from their duty.

The decision in this particular case of *Ashby v. White*, occasioned one of the most furious controversies between the Houses of Lords and Commons of which there is any example in English history. A full account, setting forth at large the parliamentary documents respecting it, will be found in the notes to Mr. Gale's excellent edition of Lord Raymond, pp. 597 to 608. It arose from an idea entertained by the Commons that the attempt to bring a case involving the right to the elective franchise before a court of law, was a high breach of the privileges of their House; and they proceeded so far as to order that Mr. Mead (Ashby's attorney) [should be taken into custody,] and [to commit] the plaintiffs in several similar actions [to Newgate.] Paty, one of these plaintiffs, sued out a *habeas corpus* to the keeper of Newgate, who returned the Speaker's warrant of commitment. On argument upon this return, Powell, Powys, and Gould, JJ., held, against the opinion of Lord Chief Justice Holt, that they had no authority to discharge the prisoner. On this decision Paty proposed to bring a writ of error, for which he applied, and the

judges being summoned to deliver their opinion, whether a writ of error was a writ of right or of grace, ten of them were of opinion that it was of right, except in treason and felony. The parliament was, however, prorogued before the writs were issued, but not before the House of Commons, who appear to have been actuated by great indignation, had committed Mr. Cæsar, the cursitor, for neglecting to inform them what writs of error were applied for, and had also directed the Serjeant-at-Arms to take into custody Mr. Montagu, Mr. Letchmere, Mr. Denton, and Mr. Page, who had been counsel for the prisoners on the return of the *habeas corpus*. Mr. Montagu and Mr. Denton were accordingly apprehended, and the Serjeant-at-Arms informed the House "that he had also like to have taken Mr. Nicholas Letchmere, but that he had got out of his chambers in the Temple, two pair of stairs high, at the back window, by the help of his sheets and a rope." This gentleman was afterwards Attorney-General. Writs of *habeas corpus* were served on the Serjeant-at-Arms on behalf of Mr. Montagu and Mr. Denton, but the House forbid him to make any return thereto. At last, after two conferences between the Houses, which served only to widen the breach, the Queen put an end to the dispute by proroguing parliament. [See Hallam's Constitutional History of

England, 6th ed., vol. ii. 436—439, 444.]

In the course of these discussions the Lords appointed a committee for the purpose of preparing an argument in the shape of a report upon the proceedings in the case of *Ashby v. White*. This argument was principally drawn up by the Lord Chief Justice, and contains a masterly disquisition upon all the subjects connected with the case. It is printed entire in the note by Mr. Gale above referred to, and consists of three parts: *first*, it is argued that the plaintiff had a right to vote; *secondly*, that if so, he must, as a necessary consequence, as an inseparable incident to his right, have a *remedy* to assert and maintain it; *thirdly*, that his proper remedy was that which he had pursued, *viz.*, by action. [See 6 Cobbett, Parliamentary History, 224.

It will be observed that the declaration in *Ashby v. White* charged the defendants with fraud and malice. Of this, according to the text, the Lord Chief Justice took no notice. But according to a revised form of his judgment, prepared by the learned judge himself, he appears to have observed that, according to the very words of the Statute of Westminster, 1, c. 5, the action lay, because fraud and malice were alleged in the declaration, and had been proved (see the judgments of Lord Chief Justice Holt

in *Ashby v. White*, and in the case of *John Paty and others*, published by Saunders & Benning, of Fleet Street, A.D. 1837, p. 12); and in the argument prepared by the Committee of the House of Lords, the fraud and malice are expressly stated to be the gist of the action. In the words of that argument, "There is no danger to an honest officer that means to do his duty; for where there is a real doubt touching the party's right of voting, and the officer makes use of the best means to be informed, and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such case, nor can any court direct them to do it; *for it is the fraud and the malice that entitles the party to the action*. In this case the defendants knew the plaintiff to be a burgess, and yet fraudulently and maliciously hindered him from his right of voting; and justice must require that such an unjust and ministerial officer should not escape with indemnity." 6 Cobbett, Parliamentary History, 314. And subsequently, in reference to *Ashby v. White*, the House of Lords resolved, "that by the known laws of this kingdom, every freeholder or other person having a right to give his vote at the election of members to serve in parliament, and being *wilfully* denied or hindered so to do by the officer who ought to receive the same, may maintain an action in

the Queen's courts against such officer to assert his right, and recover damages for the injury;" and see 17 Lords' Journals, 707. Yet both Lord Holt and subsequently the House of Lords held the office of a returning officer to be merely ministerial. "That the officer is only ministerial in this case, and not a judge, nor acting in a judicial capacity, is most plain; his business is only to execute the precept, to assemble the electors, to make the election by receiving their votes, computing their numbers, and returning the persons elected; the sheriff or other officer of a borough is put to no difficulty in this case, but what is absolutely necessary in all cases. If an execution be against a man's goods, the sheriff must at his peril take notice what goods a man has." 6 Cobbett, Parliamentary History, 314 (and see Com. Dig. Viscount (C. 4), and the form of the writ, Dalton's Office of Sheriff, 337). But in the great case of *Barnardistone v. Soame*, decided previously to *Ashby v. White*, and in which the House of Lords, affirming the judgment of the Exchequer Chamber, held that an action could not be maintained against a returning officer for having falsely and maliciously made a double return, North, C. J. (afterwards Lord Keeper Guilford), held the officer to be a *judge* as to declaring the majority, and therefore not liable, although he acted with

fraud and malice. 6 Howell, State Trials, 1095 (see further as to the exemption of judges from civil liability, *Garnett v. Ferrand*, 6 B. & C. 625, 626; *Fergusson v. Earl of Kinnoul*, 9 C. & F. 251; *Kemp v. Neville*, 10 C. B. N. S. 523; and *Thomas v. Churton*, 31 L. J. Q. B. 139). These extremes were avoided by Lord Tenterden in *Cullen v. Morris*, 2 Stark. 587. "The returning officer," said his lordship, "is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial; they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever, in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action." This passage was cited with approbation in *Tozer v. Child*, Cam. Scacc. 7 E. & B. 377. (See also Dalton's Office of Sheriff, 35, and the form of oath given by 2 Geo. 2, c. 24, s. 3; *Fergusson v. Earl of Kinnoul*, per Lord Brougham, 289; and as to the mode of directing the jury upon the question of malice, *Drewe v. Coulton*, 1 East, 563, note (a), 2 Luders, 245, note (F), and *Cullen*

v. *Morris*.) There are several instances of offices analogous to that of the returning officer for members of parliament, as it existed at common law, to which the principles above stated will apply: thus in *Tozer v. Child*, Cam. Scacc. 7 E. & B. 377, which was an action against churchwardens for maliciously rejecting the plaintiff's vote at an election for vestrymen, under the 18 & 19 Vict. c. 120, the defendants were held not to be liable, because it did not appear that they had acted maliciously (and see Buller, N. P. 64; Bac. N. Abr. Action on the Case (F), 1). But with regard to the returning officer of members of parliament, the 6 & 7 Vict. c. 18, s. 82, has made it unlawful for him to reject any vote tendered by a person whose name is on the register of voters, unless it appears to him, on putting to such person the questions as to identity, and as to whether he has voted before at the same election, that the person claiming to vote is not the person whose name appears on the register, or that he has voted before, or unless such person refuses to answer these questions, or to take either of the two oaths prescribed by the act. And, by s. 86, even if the person tendering the vote appears to be personating the registered voter, the officer is bound (if these questions are answered in the affirmative, and the oaths, if required, are taken) to receive the vote, though under

protest. In *Pryce v. Belcher*, p. 256, *suprà*, it appears to have been assumed that after the passing of this act, the officer might be liable to an action for damages for refusing to receive a vote wilfully, though not maliciously. But it was not necessary in that case to consider the effect of the 97th section of the act, which provides a particular remedy, namely, an action of debt for a penalty against the returning and other officers for every *wilful* misfeasance or *wilful* act of commission or omission contrary to the act, but preserves any remedy against any returning officer according to the law then in force. (See *Stevens v. Jeacocke*, 11 Q. B. 731; *Shepherd v. Hills*, 11 Exch. 55; *St. Pancras Vestry of, v. Batterbury*, 2 C. B. N. S. 477.) Probably the breach of so plain a duty as that of the officer to receive the vote would in itself be deemed sufficient evidence to support an allegation of malice.

It may be useful to set forth here the rules laid down by Willes J., with reference to remedies in cases of statutory liability, in the *Wolverhampton Waterworks Co. v. Hawkesford*, 28 L. J. C. P. 242. "There are," said the learned judge, "three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-enacted by the statute, with a special form of remedy;

there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it and with respect to that class it has been always held that the party must adopt the remedy given by the statute." See also *Couch v. Steel*, 3 E. & B. 402, which was an action against a shipowner for not supplying medicines pursuant to a

statute which imposed a penalty only.]

For some particulars of a [later] memorable conflict between the House of Commons and the Court of Queen's Bench, which cannot be stated within the limits of a note, see *Stockdale v. Hansard*, 7 C. & P. 731; 9 A. & E. 1; 11 A. & E. 253; the case of the *Sheriff of Middlesex*, 11 A. & E. 273; the statute of 3 & 4 Vict. c. 9; *Stockdale v. Hansard*, 11 A. & E. 297; *Howard v. Gossett*, 1 Car. & K. 380; *Howard v. Gossett*, 10 Q. B. 359; *Gossett v. Howard*, 10 Q. B. 411; *Kielly v. Carson*, 4 Moore, P. C. 63; and May's Law of Parliament, 125. [*Ashby v. White* appears to have been acted upon in *Milward v. Serjeant*, Hil. T. 1786, without any interference upon the part of the House of Commons. See 1 East, 567, note; and 2 Luders, 248.]

BIRKMYR v. DARNELL.

MICH.—3 ANNE, B. R.

[REPORTED SALKELD, 27.]

A promise to answer for the debt, default, or miscarriage of another, for which that other remains liable, must be in writing to satisfy the Statute of Frauds. Contra, where the other does not remain liable.

Mod. Cases,
248. S. C. by
name of *Bour*
Kamire v.

Darnell.

† In such a
case the ques-
tion to which
of the two was
credit given, is
generally left
to the deter-
mination of
the jury, who,
in deciding it,
must take into
their considera-
tion all the cir-
cumstances of
the case. *Keate*
v. Temple, 1 B.
& P. 158 ;
Darnell v.

Trott, 1 C. &
P. 82 ; *Storr*
v. Scott, 6 C.
& P. 241. If,

on production
of the plain-
tiff's books, it
appear the de-
fendant was
not originally
debited there,
that is strong
evidence that
he is but a

surety, but it is not conclusive. *Keate v. Temple*, *Croft v. Smalwood*, 1 Esp. 121. As to the employment of an attorney by a person really interested in the event of a suit, though not a party to the record, see *Howes v. Martin*, 1 Esp. 162, *Noel v. Hart*, 8 C. & P. 230.

DECLARATION. That in consideration the plaintiff would deliver his gelding to A., the defendant promised that A. should re-deliver him safe, and evidence was, that the defendant undertook that A. should re-deliver him safe : and this was held a collateral undertaking for another ; for where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements ; but where the whole credit is given to the undertaker, so that the other party is but as his servant, *and there is no remedy against him*, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as an *assumpsit* upon the promise against this defendant.

Et per Cur. If two come to a shop (†), and one buys, and the other, to gain him credit, promises the seller, *If he does not pay you, I will*, this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, *Let him have the goods, I will be your*

paymaster, or *I will see you paid* (†), this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

† This form of words can make no difference if the undertaking be really collateral,

for in *Matson v. Wharam*, 2 T. R. 80, where the words were “If you do not know him you know me, and *I will see you paid*,” the statute was considered to apply.

THE *fourth* section of the *Statute of Frauds* enacts, that “no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate ; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person ; or to charge any person upon any agreement made in consideration of marriage ; or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them ; or upon any agreement that is not to be performed within the space of one year from the making thereof ; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.”

The present case turned, as we have just seen, on the meaning of the words “upon any special promise to answer for the debt, default, or miscarriage of another person ;” and the distinction here taken has ever since been held the true one, and is clearly explained,

and all the subsequent cases discussed, in the notes to *Forth v. Stanton*, 1 Wms. Saunders, 211, c. n. (l), to which the reader is referred ; and where the following rule, which is in substance the very same with that in *Birkmyr v. Darnell*, is laid down for the purpose of distinguishing between the cases which do and those which do not fall within the statute. “The question is, *What is the promise ?*—is it a promise to answer for the debt, default, or miscarriage of another, *for which that other remains liable ?*—not what the *consideration* for that promise is : for it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless, as in the case of *Goodman v. Chase*, 1 B. & A. 297, it be an extinguishment of the liability of the original party.” In that case the defendant, in consideration that the plaintiff would discharge A. B., whom he had taken under a *capias ad satisfaciendum*, promised to pay A. B.’s debt. It was held unnecessary that the promise should be in writing, for the defendant’s liability on his promise could not begin till the plaintiff had discharged A. B. out of cus-

tody, since that discharge was made a condition precedent; but, the moment A. B. was discharged his liability was at an end, so that the defendant was never liable for a debt of A. B.; the debt had ceased to be due from A. B. before the defendant became liable to pay it. The same point occurred in *Butcher v. Stewart*, 11 M. & W. 857. So also in *Bird v. Gammon*, 3 Bing. N. C. 889, the defendant, in consideration that plaintiff would with Lloyd's other creditors give up their claims against Lloyd, and that Lloyd's farm should be assigned to the defendant, undertook to pay the plaintiff, this was held not to be a promise to pay the debt of a third party, for Lloyd ceased to be liable. (See *Good v. Cheeseman*, 2 B. & Ad. 328, and the note to *Cumber v. Wane*, post.) But where A. as attorney for B. sued C. and it was agreed that the suit should be put an end to, and that C. should pay A. the costs due by B., this was held within the statute, *Tomlinson v. Gell*, 6 A. & E. 564. Accord. *Green v. Cresswell*, 10 A. & E. 453, where the rule above cited was approved of by the court, and *Thomas v. Cook*, 8 B. & C. 728, where it had been stated generally [by Bayley, J.] that promises to indemnify were not within the statute, was reflected upon. In *Eastwood v. Kenyon*, 11 A. & E. 446, the Court of Queen's Bench held that the promise would not require a writing if made to the debtor him-

self, and they expressed an opinion that the statute applies only to promises made to the person to whom another is answerable. This view, which would limit the generality of the rule laid down by [the learned editors of Wms. Saunders] and seems not altogether reconcilable with the doctrine in *Green v. Cresswell*, *suprà*, has been recognised and acted upon by the Court of Exchequer in *Hargreaves v. Parsons*, 13 M. & W. 561, where it is laid down, that "the statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee." [Accord. *Reader v. Kingham*, 13 C. B. N. S. 344; S. C. 32 L. J. C. P., where the point is said to have been distinctly settled, and *Cripps v. Hartnoll*, 32 L. J. Q. B. 381, a case decided in the Exchequer Chamber, where a promise to indemnify against becoming bail in a criminal proceeding was held not to fall within the statute, and the court did not feel itself called upon to overrule *Green v. Cresswell*, the proceedings there having been of a civil nature; and see the observation of Williams, J., in *Fitzgerald v. Dressler*, 7 C. B. N. S. 385, and *Batson v. King*, 4 H. & N. 740, in which case Pollock, C. B., expressed an opinion that *Green v. Cresswell* was erroneously decided. *Batson v. King*

was a case in which the plaintiff having been compelled, on default of the acceptor, to pay a bill of exchange which he had drawn for the accommodation of the acceptor and the indorser, on the faith of an oral promise to him by the indorser that he should not be called upon to pay the bill, was held entitled to recover the amount from the indorser as money paid to the use of the latter, it appearing that the bill was made, accepted, and indorsed for the purpose of enabling the defendant and the acceptor to raise money on the security of it for their own use, and that as between them and the plaintiff the latter was a surety for them jointly to the party who discounted the bill. A promise by a man to pay off an incumbrance on his property which another is liable to pay is not within the act; thus, if A. sells goods to B. and B. re-sells them to C., and A. has a lien on the goods for the price payable by B., C.'s promise to A. to pay him in discharge of the lien the amount of the price payable by B., is enforceable although it be not in writing. See *Fitzgerald v. Dresser*, 7 C. B. N. S. 374.] The statute does not apply to the contract by a *del credere* agent with his principal, which need not, therefore, be in writing, *Couturier v. Hastie*, 8 Exch. 40, [*Wickham v. Wickham*, 2 Kay & J. 478, 486, per Kindersley, V. C. It does apply to an agreement to give a

guarantee, *Mallett v. Bateman*, 16 C. B. N. S. 530; S. C., 35 L. J. C. P. 40 in Cam. Scacc.]

When it is settled that the promise is one to answer *for the debt, default, or miscarriage of another*, within the meaning of the statute; or, to use Lord Holt's expression in the text, that it is a *collateral*, not an *original* promise; the next question that occurs is; what must, in order to satisfy the act, appear in the writing thereby required? Now, the act in terms requires that the *agreement, or some memorandum or note thereof*, shall be in writing; and it [was] held that the word *agreement* comprehends both a *consideration* and a *promise*; and that both these must, therefore, appear in the writing. This was determined in the celebrated case of *Wain v. Warlters*, 5 East, 10, in which an action of *assumpsit* was brought on the following guaranty:

"Messrs. Wain & Co.

"*I will engage to pay you, by half-past four this day, fifty-six pounds and expenses on bill, that amount on Hall.*

"*John Warlters.*

"2 Cornhill, April 30, 1803."

The Court of King's Bench held that this was not sufficient, inasmuch as it did not state the consideration for Warlters' promise. "The words of the statute," said Mr. Justice Grose, "are, that no action shall be brought, whereby to charge the defendant on any special promise to answer for the

debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, &c. What is required to be in writing, therefore, is the *agreement*, not the promise, as mentioned in the first clause, or some note or memorandum of the *agreement*. Now the *agreement* is, that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound, and this is required to be *in writing*. If it were only necessary to show what one of them was to do, it would be sufficient to state the promise made by the defendant who was to be charged with it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent, for, without the parol evidence, the defendant cannot be charged upon the written contract, for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that *the agreement*, by which must be understood *the whole agreement*, should be in writing."

This case having been frequently doubted, was at last confirmed by *Saunders v. Wakefield*, 4 B. & A.

596. The guaranty on which that action was brought was as follows:—

"*Mr. Wakefield will engage to pay the bill drawn by Pitman in favour of Stephen Saunders.*"

This instrument being set out in the replication to a plea of the statute, was held upon demurrer to be insufficient. The doctrine of *Wain v. Warlters* was on that occasion affirmed, and [was] never [afterwards] doubted. See *Jenkins v. Reynolds*, 3 B. & B. 14; *Morley v. Boothby*, 3 Bing. 107; *Whitcombe v. Lees*, 5 Bing. 34; *Cole v. Dyer*, 1 C. & J. 461, 1 Tyrwh. 307; *Wood v. Benson*, 2 Tyrwh. 98; *Bushell v. Beavan*, 1 Bing. N. C. 103; *Hawes v. Armstrong*, Ib. 761; *Ellis v. Levi*, Ib. 767; *James v. Williams*, 5 B. & Ad. 1109; *Clancy v. Piggott*, 2 A. & E. 473; *Raikes v. Todd*, 8 A. & E. 448; *Semple v. Pink*, 1 Exch. 74 [the authority of which was shaken by *Oldershaw v. King*, 2 H. & N. 517]; and *Price v. Richardson*, 15 M. & W. 539, where the guaranty holden invalid was—

"1843, June 28.—*Mr. Price, I will see you paid for £5 or £10 worth of leather, on the 6th of December, for Thomas Lewis, shoemaker.*

"*Robert Richardson.*"

[But in consequence of the difficulty of setting forth the consideration in a sufficient manner to satisfy the courts of law, this rule proved to be a grievance to the mercantile community, and

therefore, after having been in force for more than half a century, it was at last rescinded by the "Mercantile Law Amendment Act, 1856" (19 & 20 Vict. c. 97), the 3rd section of which enacts that no special promise to be made by any person after the passing of that act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, *by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.* This enactment, therefore, extends to cases within the second branch of the 4th section of the Statute of Frauds the rule which had been already applied to the 17th section, namely, that it is sufficient if the *promise* of the party to be charged appears in the writing. See *Egerton v. Matthews*, 6 East, 307. The statute does not, it must be observed, exempt guarantees from the application to them of the ordinary rules of evidence with reference to written instruments, except in so far as it allows the terms constituting the consideration to be added by parol, and in so far as it admits proof of the actual consideration] in cases of patent ambiguity, where

the language of the instrument renders it uncertain as to which of two or more matters severally mentioned therein was the consideration upon which it was given. [If the instrument states that to be the consideration for the promise which in law is no consideration, and a consideration cannot be collected from the rest of the instrument (*Oldershaw v. King*, 2 H. & N. 517), or if, looking only to the terms of the instrument, it appears that no consideration was given, or if the consideration is mis-stated, in none of these cases does the recent act profess to affect the rule, that the terms of a written instrument cannot be varied by parol, yet cases may be conceived in which the real consideration may and ought to be introduced by parol to sustain the written promise. Further, if the whole of the *promise* does not sufficiently appear in writing, parol evidence of the consideration is not admissible to supply the defect. This latter point was decided by *Holmes v. Mitchell*, 7 C. B. N. S. 361. There the defendant had by word of mouth advised the plaintiff (assuring him that he would run no risk) to lend 400*l.* to Spooner and Cubitt on mortgage of certain premises, and the defendant having consulted Lyne (his solicitor), addressed the following letter to the plaintiff:—

"Dear Charles,

"I saw Mr. Lyne this morning, and I told him he had better

call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. I will undertake any responsibility myself respecting it, should there be any.

“*W. Mitchell.*”

Shortly afterwards the plaintiff, acting on the faith of this letter, lent the 400*l.* on the mortgage, and thereby suffered a considerable loss. Thereupon he sued the defendant as on a guaranty, founding his declaration on the promise contained in the defendant's letter. Under these circumstances the court held that the action would not lie. “At the time the letter was written,” said Williams, J., delivering the judgment of the court, “*no mortgage existed.*” The letter is silent as to the sum to be advanced, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter, if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning; it evidently refers to previous conversations in which those particulars were supplied. The whole promise, therefore, is not in writing, as the statute

requires that it should be. It cannot be made out without reference to previous conversations. In *Shortrede v. Cheek*, 1 A. & E. 57; 3 N. & M. 866; and in *Bateman v. Phillips*, 15 East, 472; an existing document or an existing debt was referred to in the writing, so that evidence of oral statements was not necessary to explain the promise. The recent statute 19 & 20 Vict. c. 97, s. 3, it is true, abrogates the rule laid down in *Wain v. Warlters*, 5 East, 17, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration expressed in writing formerly discharged two offices, it sustained the promise, and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further, and explain the promise.”

In order to determine whether the promise sufficiently appears in writing, recourse must still be frequently had to the authorities decided upon the questions relating to the sufficiency of the statement of the consideration, for many of these cases were decided upon grounds which would have been equally applicable had the questions turned on the sufficiency of the statement of the promise. Thus it will be sufficient (as has been held in regard to the *consideration*) if the *promise*] can be gathered by fair intendment from the whole tenor of the writing, not that a mere *conjecture*, however

plausible, would be sufficient to satisfy the statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum. See the judgments of Tindal, C. J., in *Hawes v. Armstrong*, and of Patteson, J., in *James v. Williams*, 5 B. & Ad. 1109; *Bentham v. Cooper*, 5 M. & W. 628; and *Jarvis v. Wilkins*, 7 M. & W. 410. In *Shortrede v. Cheek*, *suprà*, where a guaranty was expressed to be in consideration that the plaintiff "would withdraw the promissory note," the Court of King's Bench held that it was sufficiently certain, and that parol evidence was admissible to show what promissory note was meant. [And the promise having been to pay the promissory note, the parol evidence was as much required to apply the promise as the consideration. In *Bateman v. Phillips*, *suprà*, the plaintiff was on the point of suing David Williams for a debt, when his attorney received this letter signed by the defendant:

"Sir,

"The bearer, David Williams, has a sum of money to receive from a client of mine next week, and I trust you will give him indulgence till that day, when I undertake to see you paid."

The debt of Williams, which was the subject-matter both of the consideration and promise, having been identified by parol evidence, the letter was held suf-

ficient to take the case out of the statute. The above two cases are illustrations of the general rule that parol evidence is admissible to identify the subject-matter of a written instrument. See also *Macdonald v. Longbottom*, 1 E. & E. 977; 29 L. J. Q. B. 256; *Mumford v. Gething*, 7 C. B. N. S. 305.

The rule of construction, *ut res magis valeat*, was applied to the case of a guaranty in *Broom v. Batchelor*, 1 H. & N. 255. There the agreement between the plaintiff and defendant was as follows:—

"In consideration of the credit given by Mr. S. Broom to Mr. J. Edge, I (the defendant) hereby guarantee the payment of all bills of exchange drawn by the said S. B., and accepted by the said J. Edge. Also I hereby agree to guarantee the payment of any balance that *may be* due from the said J. Edge to the said S. Broom. This guarantee to include all bills of exchange now running, as well as the balance of account due;" and it was held that the writing extended to future transactions, and was sufficient to support an action on a promise to answer for the default of Edge in respect of a bill accepted by him after the date of the agreement. And see *Oldershaw v. King*, Cam. Scacc., 2 H. & N. 517, in which case a promise to forbear to press for immediate payment was deemed a good consideration.]

Parol evidence is admissible, as

in the case of a will or other written instrument, not to alter or vary the meaning of such guaranty, but to interpret or explain it; not to make that appear to be a consideration which upon the face of the guaranty appears not to be so; but either (as in *Shortrede v. Cheek*) to fix the particular subject-matter to which the guaranty relates, or even to show, by reference to time or other circumstances, that matter indicated by the guaranty, but which, as described therein, may be a good, and does not appear to be a bad, is, by reason of such circumstances, in fact a good consideration. Thus, in *Haigh v. Brooks*, 10 A. & E. 309, parol evidence was holden admissible to show that in a guaranty worded—

"In consideration of your being in advance to L. in the sum of £10,000 for the purchase of cotton, I do hereby give you my guaranty for that amount, on their behalf"—future advances were referred to, and so that it was valid. And in *Goldshede v. Swan*, 1 Exch. 154, a guaranty as follows:—

"In consideration of your having this day advanced to our client, Mr. S. D., £750, secured, &c., we hereby jointly and severally undertake, &c."—was held to be "sufficiently ambiguous"—(that is, not ambiguous as to what was the matter intended to be the consideration, for that was sufficiently identified, but as to whe-

ther that matter, when its *circumstances* were ascertained, would furnish a sufficient consideration in point of law)—to admit of evidence to show that the advance was not a past one, but made simultaneously with the execution of the guaranty; and a declaration stating the promise to have been made in consideration that the plaintiff "would" lend, &c., was sustained. In each of those cases the subject-matter of the consideration was identified by the writing, and its circumstances only added by parol, which being ascertained, there was no longer any doubt, that that which by the writing itself appeared to be the consideration, was a valid consideration in point of law. But in *Price v. Richardson*, 15 M. & W. 539, *suprà*, it was doubtful, upon the face of the guaranty, whether the consideration was the supply of the leather, or forbearance until the 6th of December. [See also *Hoad v. Grace*, 7 H. & N. 494; S. C. 31 L. J. Exch. 98, (where "goods supplied," was construed to mean goods to be supplied,) and the observations of Williams, J., in *Way v. Hearn*, 13 C. B. N. S. 305.]

In *Raikes v. Todd*, 8 A. & E. 846, a guaranty thus:—

"Oct. 19th, 1832.—I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance to D., on his account with you commencing 1st Nov. 1831, not exceeding £2000"—was considered invalid

on the ground that it was doubtful whether the consideration consisted of forbearance to sue for the past advances, or partly that and partly the making of further advances, and the court decided that, at all events, it did not sustain a declaration alleging the *advances* to be the consideration. There can, however, be no doubt that, as suggested by Parke, B., in *Kennaway v. Treleavan*, 5 M. & W. 498, the future advances would form a sufficient consideration for a guaranty of their own amount, and also of the past advances; and accordingly in *Johnstone v. Nicholls*, 1 C. B. 251, and *Chapman v. Sutton*, 2 C. B. 634, guaranties of past and future debts given in consideration of a continuance of dealings with the principal debtor were sustained.

Provided that the agreement [or *promise*] be reduced to writing according to the above rules, it matters not out of how many different papers it is to be collected, so long as they can be sufficiently connected in sense. *Jackson v. Lowe*, 1 Bing. 9; *Philimore v. Barry*, 1 Camp. 513; *Saunderson v. Jackson*, 2 B. & P. 398; *Allen v. Bennett*, 3 Taun. 169; *Dobell v. Hutchinson*, 3 A. & E. 355. See *Johnson v. Dodgson*, 2 M. & W. 653; *De Bert v. Thompson*, 3 Beav. 471; *Coldham v. Showler*, 3 C. B. 312; *Saunders v. Cremer*, 3 Dru. & War. 87; *Green v. Cramer*, 2 Con. & L. 54; *Hammersley v. Baron de*

Biel, 12 Cl. & F. 45; [*Ridgway v. Wharton*, 6 H. of Lords Cases, 238.] But this connection in sense must appear upon the documents themselves, for parol evidence is not admissible for the purpose of connecting them.

That was one of the principal points decided in *Boydell v. Drummond*, 11 East, 142, which arose upon this section of the act, although the instrument there sued upon was not a guaranty. In that case the plaintiff proposed to publish a magnificent edition of Shakspeare, illustrated by seventy-two engravings, which were to come out in numbers, at three guineas per number, two of which were to be paid in advance; each number was to contain four engravings; "*one number at least was to be published annually*, and the proprietors were confident that they should be able to produce two numbers *in the course of every year*." These proposals were printed in a *prospectus*, and lay in the plaintiff's shop. The plaintiff also kept a book, which had for its title "*Shakspeare subscribers, their signatures*:" but did not refer to the *prospectus*. The defendant determining to become a subscriber to the work, signed his name in the book containing the list of subscribers, but afterwards refusing to continue to take it in, though he had received and paid for some few numbers, this action was brought against him to compel him to complete his

contract. The court decided 1st, That the agreement was one not to be performed within the space of a year from the making thereof; that it was therefore within the 4th section of the Statute of Frauds, and it was necessary that there should be a note or memorandum of it in writing, signed by the defendant. See the notes to *Peter v. Compton*, post, 296. 2ndly, They held that though the *prospectus* contained the terms of the agreement, and would be sufficient memorandum thereof if it could be coupled with the book in which the defendant signed his name; still, as it contained no reference to the book, nor the book to it, there was no connection in sense between them which would enable the court to couple them together and treat them as one document. And 3rdly, they held that such connection could not be introduced by parol evidence, but must, in order to satisfy the statute, appear upon the face of the documents themselves. [And see the judgment of Williams, J., in *Peek v. North Staffordshire Rail. Co.*, E. B. & E. 997; and S. C. in Dom. Proc. 32 L. J. Q. B. 241; and *Fitzmaurice v. Bayley*, 9 H. of L. 78.] They also held that the part performance which had taken place made no difference.

It does not signify to whom the memorandum containing the agreement is addressed: it may be contained in a letter to a third person. *Per* Lord Hardwicke, 3

Atk. 503; 2 Cha. Rep. 147; 1 Vernon, 110; *Bateman v. Phillips*, 15 East, 272; *Longfellow v. Williams*, Peake's Add. Ca. 225. [*Gibson v. Holland*, 35 L. J. C. P. 5. It may be merely an offer, acted upon. *Powers v. Fowler*, 4 E. & B. 511; *Smith v. Neale*, 2 C. B. N. S. 67; and see *Peek v. North Staffordshire Rail. Co.*, *supra*: *Holmes v. Mitchell*, *supra*, p. 279; *Shadwell v. Shadwell*, 9 C. B. N. S. 159; 30 L. J. C. P. 145; *Forster v. Rowland*, 7 H. & N. 103; 30 L. J. Exch. 396.] The reason of this is, that the memorandum is necessary only to evidence the contract, not to constitute it. The contract, as was observed by Tindal, C. J., in *Laythoarp v. Bryant*, 2 Bing. N. C. 744, is made before any signature thereof by the parties. It is upon this ground that the case of *Leroux v. Brown*, 12 C. B. 801, in which it was held that a contract within the statute, though made abroad, must be in writing, professes to be founded—*quære*. [The names or description of both of the parties to the agreement must appear in the memorandum, *Williams v. Lake*, 29 L. J. Q. B. 1. In *Warner v. Willington*, 3 Drew, 525; 25 L. J. Cha. 662, Kindersley, V. C., was of opinion that the omission of the lessor's name in a memorandum of agreement for a lease was supplied by a subsequent letter referring to that memorandum, and showing who the intended lessor was. As to writings not

intended to contain the whole terms of the agreement, see *Harris v. Richetts*, 4 H. & N. 1; 28 L. J. Exch. 47; or to operate unless signed by both parties, *Herbert v. Treherne*, 3 M. & G. 755; *Furness v. Meek*, 27 L. J. Exch. 34; and see *Heyworth v. Knight*, 17 C. B. N. S. 298; 33 L. J. C. P. 298, where writings contemplating the drawing up of a formal contract were sufficient evidence of the contract, the formal document having been so framed as not to be binding.]

With respect to the signature, it is only necessary that the memorandum should be signed by the party against whom it is sought to enforce the contract, *Laythoarp v. Bryant*, 2 Bing. N. C. 744; [*The Liverpool Borough Bank v. Eccles*, 4 H. & N. 139.] See *Aveline v. Whisson*, 4 M. & G. 801; *Cooch v. Goodman*, 2 Q. B. 580. It was objected in *Laythoarp v. Bryant*, which case arose on a contract to sell lands, that unless the agreement were signed by both parties, there would be a want of mutuality, as the party who signed would be bound, and the party who had not signed would be loose, and so that there would be no consideration for his agreement. "But," said the Lord Chief Justice, "whose fault is that? The defendant might have required the plaintiff's signature, but the object of the statute was to secure the defendant's. The preamble runs, 'for prevention of

many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury;' and the whole object of the legislature is answered, when we put this construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and mutuality of claims. It is true the consideration must appear upon the face of the agreement. *Wain v. Walters* was decided on the express ground that an agreement under the fourth section imports more than a bargain under the seventeenth; but I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement is in truth made before any signature." [Indeed this doctrine has been carried to its extreme limit in those cases, old and new, where a signed proposal of a contract assented to by parol has been held sufficient as a memorandum to bind the party proposing. The cases are collected in *Reuss v. Picksley*, 35 L. J. Exch. 218, in Cam. Scacc.

It is of course possible that the agreement may be so framed as not to be binding, unless both parties have signed; as where one signs on condition that the terms of the writing are not to

be obligatory unless the other signs. See *Furness v. Meek*, 27 L. J. Exch. 34. Deeds are not affected by the Statute of Frauds, see *Cherry v. Hemming*, 4 Exch. 631; *Holmes v. Mitchell*, *supra*, p. 279, *per* Willes, J. As to signature by auctioneers and factors, see *Parnton* app., *Crofts* resp., 16 C. B. N. S. 11; 33 L. J. C. P. 189; *Durrell v. Evans*, 6 H. & N. 660; S. C. 30 L. J. Exch. 254.]

The words attributed in the text of the principal case to the court, who are made to say that a collateral undertaking is *void* without writing, by the Statute of Frauds, are too strong, if literally understood; for the act does not direct that the promise shall be *void*, but that "no action shall be brought" upon it; and Bosanquet, J., remarks, in *Laythoarp v. Bryant*, that the seventeenth section is in this respect stronger than the fourth, for the seventeenth avoids contracts not made in the manner there prescribed, [that is to say, makes them void so long as they remain unwritten, see *Bailey v. Sweeting*, *post*, p. 287]. Accordingly, though no *action* can be brought upon a parol guaranty, the courts have been known to enforce one against an attorney, by virtue of their summary jurisdiction over their own officers, see *Evans v. Duncan*, 1 Tyrwh. 283; *Senior v. Butt*; and *Payne v. Johnson* there cited. And this jurisdiction was asserted by Coleridge, J., in *re Hilliard*, 2 D. & L.

919. It is hardly necessary to add, that an agreement invalid for want of writing to satisfy the statute, has no tinge of *illegality*, and may be given in evidence with the same effect as any other promise binding in honour and conscience, though not in law; for instance, in *Cresswell v. Wood*, 10 A. & E. 460, where A. drew a bill of exchange on B., who accepted it, and A. discounted it, and applied the money in liquidation of a demand on C., made on him as surety for the debt of D., against which A. had promised to indemnify him, the agreement to indemnify, although by parol (being in fact the same which had in *Green v. Cresswell* been held to require a writing) was allowed to be given in evidence on behalf of B., for the purpose of supporting a plea that the bill was for A.'s own accommodation. And in *Sweet v. Lee*, 4 Scott, N. R. 77; [3 M. & G. 452] a memorandum by which an annuity was payable by the plaintiff to the defendant having been put in suit by the plaintiff, and appearing to be invalid for want of stating a consideration, the plaintiff sought to recover, as upon a failure of consideration, payments which he had made for several years on account of the annuity; but the Court of Common Pleas distinguished the case from those in which the contract is one that the law has declared to be void, Tindal, C. J., saying, "The contract is not

void; there is simply a failure of evidence;" and they held that the plaintiff was neither entitled to damages upon the contract, nor to recover back the payments made under it as upon a failure of consideration. However, it is not necessary in order that the statute should apply that the action should be brought on the agreement; it is enough if the effect of the action is to "charge" the defendant by means of the agreement. Thus in *Carrington v. Roots*, 2 M. & W. 248, recognised in *Reade v. Lamb*, 6 Exch. 130, trespass for asportavit of a cart, plea removal of it damage feasant, replication that defendant had sold a crop of grass to plaintiff with liberty to take it, *quare*, &c., traverse of agreement; parol evidence of such a sale was held inadmissible, and plaintiff nonsuited. And where a question arises between either of the contracting parties and a stranger, whether a contract has passed an interest in services or other property, the stranger may, equally with a party to the contract, insist upon the statute. Thus, where a contract of service is void, as between the parties to it, for want of a writing to satisfy the statute, the master can maintain no action for enticing away the servant, *Sykes v. Dixon*, 9 A. & E. 693; and a vendee cannot, where the contract of sale is invalid by the statute, effect an insurance upon the goods, *Stockdale v. Dunlop*, 6

M. & W. 224; nor, it seems, could he bring an action against the carrier, treating the vendor as his agent to forward, see *Coates v. Chaplin*, 3 Q. B. 483; [*Coombs v. Bristol and Exeter Rail. Co.*, 3 H. & N. 510; nor trover for a conversion of the goods by a stranger after the making of the actual contract and before the reduction of its terms to writing, *Felthouse v. Bindley*, 31 L. J. C. P. 204]. Also it is observable that the written memorandum must exist before action, and in that respect differs from mere evidence. *Bill v. Bament*, 9 M. & W. 36; see *Fricken v. Tomlinson*, 1 M. & G. 773. And, indeed, attending to the distinction pointed out by the Lord Chancellor Cottenham in *Dale v. Hamilton*, 2 Phillips, 266, between agreements and declarations of trust; "that, in the one it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction, that must be in writing," it may be found difficult to impute any *retroactive* effect to the subsequent written memorandum of an agreement within the statute, not originally reduced into writing. [This difficulty arose in the recent case of *Bailey v. Sweeting*, 9 C. B. N. S. 843; 30 L. J. 150. That was an action brought to recover the price of

some chimney-glasses, and also some other goods, as to which, however, no question arose. The declaration was for goods bargained and sold, it was therefore necessary to prove that the property vested in the defendant. The bargain was oral, and was intended to pass the property immediately. The plaintiff was to send the glasses by a carrier, and the defendant to pay the carriage. The goods were sent, but were damaged in the carriage, and the defendant on that account refused to receive or pay for them. More than four months afterwards the plaintiff applied to the defendant for payment of the price of the glasses, and also of the other goods. In answer the defendant wrote, saying that "the only parcel selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and *have long since declined to have for reasons made known to you at the time.*" The defendant then went on to say, with regard to the other goods, that he would pay for them at once if allowed discount. The question was whether this letter took the case out of the Statute of Frauds. On behalf of the defendant it was urged that a retroactive effect could not be given to the letter, that the parol repudiation of liability had already put an end to the contract, and that the letter was not a sufficient note or memorandum,

because on the face of it, it was written for the purpose of disclaiming liability under the contract. The court decided that the letter was a sufficient memorandum. "The effect," said Williams, J., "of the 17th section of the Statute of Frauds is that though there is a valid verbal contract, it is not actionable unless something of several things has happened, one of which is the existence of a note or memorandum in writing signed by the party to be charged. As soon as that occurs, the contract, though not previously actionable, becomes actionable, and the question, therefore, is, whether, in the present case, there exists such a memorandum as the statute refers to. It appears to me that there does. The letter of the defendant refers to all the essential terms of the bargain; and the only question is, whether it is less sufficient, because it is accompanied by a statement that the defendant does not consider himself liable for the loss arising from the default of the carrier. I do not consider that it is so. It is said that there is a difficulty in maintaining such a doctrine from the inconvenience which may arise from the property not passing until the contract becomes an actionable contract. That may be so, but the same objection would apply to the case of part payment or part acceptance, and no one doubts that a verbal con-

tract may be set up where these have afterwards occurred. . . . I do not think that the question whether the party writing the letter had a right to put an end to the contract could affect the question whether there was or was not a good contract. The intention of such party to abandon or not the contract can have nothing to do with the question whether there is a sufficient memorandum or not of the contract. Accord. *Gibson v. Holland*, 35 L. J. C. P. 35, where Willes, J., is reported to have said, "The memorandum need not have the character of a contract. The section applies to evidence only;" and see *Forster v. Rowland*, 7 H. & N. 103; 30 L. J. Exch. 396, where *Bailey v. Sweeting* was distinguished.]

When to an action brought upon a guaranty or other instrument falling within the fourth section of the Statute of Frauds, the defendant pleads that there is

no such note or memorandum in writing as that act requires, it is unnecessary to set out the memorandum in the replication, though once it was considered unsafe not to do so. *Wakeman v. Sutton*, 2 A. & E. 78; *Lysaght v. Walker*, 2 Bligh, N. S. 1. Nor is it necessary, in declaring on such an instrument, to state it to have been in writing. *Anon.*, Sal. 519; *per* Yates, J., 3 Burr. 1890. For it is a general rule in pleading, that when a statute regulates the mode of performing an act which was valid at common law, the same certainty of allegation is sufficient after the statute as before; but it has been said to be otherwise in a plea. *Case v. Barber*, T. Raym. 450; *sed quære*, and see *Peacock v. Purvis*, 2 B. & B. 362, where a sale of growing crops was pleaded, without any averment that it was in writing, and held sufficient, though *Case v. Barber* was cited and relied on.

PRICE v. THE EARL OF TORRINGTON.

TRIN. 2 ANNE.—CORAM HOLT, C. J., AT GUILDHALL.

[REPORTED SALKELD, 285.]

In an action for beer sold and delivered, in order to prove the delivery, a book was put in, containing an account of the beer delivered by the plaintiff's draymen, and which it was the duty of the draymen to sign daily. The drayman who had signed the account of beer delivered to the defendant being dead, the book was admitted in evidence on proof of his hand-writing.

See *Higham v. Ridgway*, post, vol. ii. and 7 Jac. I., c. 12.

THE plaintiff being a brewer, brought an action against the Earl of *Torrington* for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more.

Sal. 690; ib. 283. Mod. cases, 264. 2 Lord Raym. 837.

THE books supply repeated instances in which the entries of a deceased person, *contrary to his own interest*, have been, after his death, received as evidence of the facts stated by him in those entries. But the decision in the principal case seems hardly to range itself within that class of authorities, for, as remarked by Mr. Phillipps, in his "*Law of Evidence*," such a declaration by a tradesman's servant as that made by the drayman in *Price v. Lord*

Torrington, is clearly distinguishable from entries in the book of a receiver, who, by making a gratuitous charge against himself, knowingly against his own interest, and without any equivalent, repels every supposition of fraud. A disposition to commit fraud would have tempted him to suppress altogether the fact of his having received anything, or to misrepresent the amount of the sum, but not to mis-state the ground or consideration upon which it was received; that is, not to mis-state the only fact sought to be established by the proposed evidence. On the other hand, the declaration of the tradesman's servant is given in evidence to prove the fact of delivery, and as he gives the account not against his own interest, which is some security for the truth of the statement in the other case, the probability of his account being true or false is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said in every case of hearsay. The circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say. To have said nothing at all would, as he must have known, necessarily lead to inquiry.

Price v. Lord Torrington falls within the class of cases thus de-

scribed by Mr. Justice Taunton. "A minute in writing, made at the time when the fact it records took place, *by a person since deceased, in the ordinary course of his business*, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence." *Doe v. Turford*, 3 B. & Ad. 898. In that case a landlord instructed B. to give the defendant notice to quit, and B. communicated it to his partner P., who having prepared three notices to quit, two of them to be served on other persons, and three duplicates, went out, returned in the evening, and delivered to B. three duplicates, one of which was a duplicate of the notice to the defendant indorsed by P. It was proved that the other notices were delivered as intended, that the defendant had afterwards requested not to be compelled to quit, and that it was the invariable practice of the clerks of B. and P., who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. The duplicate in question was so indorsed; and it was admitted, after the death of P. to prove the service of the third notice on the defendant.

The former cases on this subject will be found cited and discussed in *Doe v. Turford*; it will therefore be unnecessary to advert to them at length in this note. See *Pitman v. Maddox*, 2 Salk. 690; *Hagedorn*

v. *Reid*, 3 Camp. 379; *Champneys v. Peck*, 1 Stark. 404; *Pritt v. Fairclough*, 3 Camp. 305, *et notas*. In *Poole v. Dicus*, 1 Bing. N. C. 649, a bill became due and was left with a notary to demand payment; M. the notary's clerk went out, returned, and, in one of the notary's books into which the bill had been previously copied, wrote in the margin *no effects*; another clerk made a similar entry in another book from M.'s dictation; all this was done in the regular course of business: the court held that after the death of M. the entry made by him was admissible to prove the dishonour of the bill. "We think it," said Tindal, C. J., "admissible, on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business, by a person who had no interest to mis-state what had occurred."

Mr. Justice Parke, in delivering his judgment, in *Doe v. Turford*, remarks a distinction between the admissibility of an entry of this description, and of an entry admitted in evidence because against the interest of the party making it. "It is to be observed," said his lordship, "that in case of an entry falling under the rule as being an admission against interest, proof of the handwriting of the party and his death is enough to authorise its reception; at whatever time it was made, it is admissible. But in the other case, it is essential to prove that it was

made at the time it purports to bear date; it must be a contemporaneous entry." 3 B. & Ad. 898; [and see the judgments in *Turner v. Hutchinson*, C. P. 9th February, 1861.]

An entry admissible after the maker's death because made in the course of business is, however, evidence of those things only which, according to the course of that business, it was the duty of the deceased person to enter, [whereas if admissible as against interest, it would be evidence of any other things contained in the declaration, and substantially connected with the same subject-matter, *R. v. The Churchwardens and Overseers of Birmingham*, 1 B. & S. 763; 31 L. J. M. C. 63.] In *Chambers v. Bernasconi*, 1 Tyrwh. 342, 4 Tyrwh. 531, *in error*, a distinction was engrafted upon the rule laid down in *Doe v. Turford*. In that case it became material to ascertain the place at which one Chambers had been arrested. The under-sheriff of Middlesex being called, produced the writ, and stated that by the course of his office the bailiff making an arrest was required immediately afterwards to transmit to the office a memorandum or certificate of the arrest, and that for the last few years an account of the place where the arrest took place had also been required from him; it was then proved that the bailiff who arrested Chambers was deceased, and the following memorandum in

his handwriting, taken from the files of the office, was tendered in evidence to prove the place where he made the arrest.

"9 November, 1825.

"I arrested A. H. Chambers the elder only in South Molton Street, at the suit of William Brereton.

"THOMAS WRIGHT."

The memorandum was held by the Court of Exchequer inadmissible for the purpose for which it was offered, and afterwards in the Exchequer Chamber, whither the point was carried by a bill of exceptions. "The ground," said Lord Denman, C. J., delivering the judgment of the Exchequer Chamber, "on which the attorney-general first rested his argument for the plaintiff in error, was not much relied on by him, *viz.*, that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule, that an entry made by a person deceased, in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described which would naturally accompany the fact itself. The discussion of this point involved the general principles of evidence, and a long list of cases determined by judges of the highest authority, from that of *Price v. Torrington*, before

Holt, C. J., to *Doe d. Patteshall v. Turford*, recently decided by Lord Tenterden in the Court of King's Bench. After carefully considering, however, all that was urged, we do not find it necessary, and therefore we think it would not be proper to enter upon that extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails the plaintiff in error cannot succeed; and *we are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.* Admitting then for the sake of argument that the entry tendered was evidence of the fact, and even of the day when the arrest was made, (both which facts it might be necessary for the officer to make known to his principal,) we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." See *Lloyd v. Wait*, 1 Phil. 61.

It is difficult, in perusing this case, *Chambers v. Bernasconi*, to avoid remarking, that, although professing to steer wholly clear of the doctrine promulgated in *Doe*

v. *Turford*, it still seems hardly reconcileable in its facts with that decision; for it was proved in *Chambers v. Bernasconi*, and is indeed stated in the judgment of the Lord Chief Justice, that the course of the office of the sheriff of *Middlesex* is, to require a return in writing of the arrest, and of the place where it is made, under the hand of the officer making it. Now it certainly, in ordinary parlance, would be said to be the officer's duty to comply with the course of the office by returning the place of arrest, had he refused to do so he would probably have been discharged. And it is difficult to see how an entry which he was required to make, and had not the choice of omitting, could be more collateral to his duty than the entry of the service of the notice to quit was to that of the person making it in *Doe v. Turford*; and it seems obvious that the entry of the place of arrest might prove of utility to the officer's employer, the sheriff; since, if an action of trespass were brought against him by the party arrested, he would, in order to his defence, be obliged to show that he arrested him within the county: so that a knowledge of the precise spot on which the caption took place might be very material and useful to him. But whatever may be our opinion as to the possibility of reconciling *Chambers v. Bernasconi* with *Doe v. Turford*, it may be safely stated,

that the former case has not shaken the general doctrine promulgated in the latter, since the attention of the Court of Common Pleas was drawn to both in *Poole v. Dicus*, 1 Bing. N. C. 649, where the authority of *Doe v. Turford* was expressly recognised; and Tindal, C. J., and Park, J., both stated that the decision in *Chambers v. Bernasconi* turned wholly on the circumstance that the officer had gone beyond the sphere of his duty in making an entry of the place of arrest. See *Baron de Rutzen v. Farr*, 4 A. & E. 53, in the report of which there seems to be some mistake; [and the observations of Pollock, C. B., in *Milne v. Leisler*, 7 H. & N. 786.] See also *Marks v. Lahee*, 3 Bing. N. C. 420; *Clark v. Wilmot*, 1 Younge & C., N. C. 53, corrected 2 id. 259 n.; *Pickering v. Bishop of Ely*, 2 id. 249; and *Lloyd v. Wait*, 1 Phil. 61. In *Doe d. Graham v. Hawkins*, 2 Q. B. 212, the account admitted was written by a clerk (still living and not called) of the deceased officer, and it had been recognised by the officer as his. In *Davis v. Lloyd*, 1 Car. & M. 275, it appeared to be the practice of the Jews that circumcision should take place on the eighth day after the birth, and that it is the duty of the chief rabbi to perform the rite and to make an entry thereof in a book kept at the synagogue. The death of the chief rabbi being proved, such an entry was offered

in evidence to show the age of a Jew, but Lord Denman, after consulting Patteson, J., rejected it, probably on the ground that the duty of the chief rabbi did not spring from any relation recognised by law.

In *Brain v. Preece*, 11 M. & W. 773, it was the course of business for H., one of the workmen at a coal-mine, to give notice of the coals sold to the foreman Y., who, not being able to write, employed another man to enter the sales, and the entries were afterwards read over to him. H. and Y. being dead, the entries were held not to be evidence, apparently on the ground that they were not made by a person having direct knowledge of the facts or a person employed by him; and Lord Abinger, C. B., observed that "as regards the case of *Price v. Lord Torrington*, it is better to adhere to that case as it stands,

and not to give any extension to it." The declarations of a deceased witness to a deed tending to show that he was concerned in forging it are inadmissible, *Stobart v. Dryden*, 1 M. & W. 615; but in that case it was not argued that they were declarations against interest, nor could that have been successfully argued according to the *Sussex Peerage Case*, 11 Cl. & Fin. 85. For the law as to admissibility of statements against the interest of the person making them, see *Higham v. Ridgway*, vol. ii., and the note. And as to parol statements being equally admissible with written ones, the same note, *Stapylton v. Clough*, 2 E. & B. 293; *Edie v. Kingsford*, 14 C. B. 750; [and see *Turner v. Hutchinson*, C. P. 9th February, 1861; *R. v. Birmingham (Churchwardens of)*, 1 B. & S. 763; S. C. 31 L. J. M. C. 63.]

PETER v. COMPTON.

TRINITY.—5 W. & M., KING'S BENCH.

[REPORTED SKINNER, 353.]

"An agreement that is not to be performed within the space of one year from the making thereof" means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of performance within the year.

THE question upon a trial before *Holt*, Chief Justice, at *Nisi Prius*, in an action upon the case, upon an agreement, in which the defendant promised for one guinea to give the plaintiff so many at the day of his marriage, was, if such agreement ought to be in writing,* for the marriage did not happen within a year: the Chief Justice advised with all the Judges, and by the great opinion (for there was diversity of opinion, and his own was *e contra* †) where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenour of the agreement that it is to be performed after the year, there a note is necessary; otherwise not.

* According to the exigency of the Statute of Frauds, 29 C. 2, c. 3, s. 4. Salk. 280.

† In *Smith v. Westall*, Lord Ray. 316, Lord *Holt* says, speaking of this case, that the reason of his opinion was, "because the design of the statute was not to trust the memory of witnesses beyond one year."

THIS case, as well as *Birkmyr v. Darnell*, turns on the fourth section of the Statute of Frauds. That section directs, among other things that no action shall be brought, to charge any person, upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, or some memorandum

or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. *Peter v. Compton* turned upon the meaning of the words printed in italics.

The opinion of the majority of the judges in this case has been often since confirmed. *Anon.*, Salk. 280; *Francam v. Foster*, Skinner, 356; *Fenton v. Emblers*, 3 Burr. 1281; 1 Bl. 333, *ubi, per* Denison, J., "The Statute of Frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specifically so agreed: it does not extend to cases where the thing *may* be performed within the year." *Accord. Wells v. Horton*, 4 Bing. 40, where it was held, that a contract by A. that his executor should pay 10,000*l.* need not be in writing: and *Souch v. Strawbridge*, 2 C. B. 808, where the contract was to maintain a child "so long as the defendant should think proper;" [and *Smith v. Neale*, 2 C. B. N. S. 67, in which all that was to be done by the plaintiff, constituting the consideration for the defendant's promise, was capable of being performed in a year; and *Ridley v. Ridley*, 34 L. J. Cha. 462.]

The words of the statute are, however, express; that no action shall lie upon any agreement that is not to be performed within one year after the making thereof, unless it be reduced into writing

and signed. Accordingly, when the defendant's wife hired a carriage for five years at ninety guineas per annum, which contract was, by the custom of the trade, determinable at any time on payment of a year's hire; the court held the case within the statute, and that the contract ought to have been in writing. *Birch v. Earl of Liverpool*, 9 B. & C. 392. And so must a contract for a year's service, to commence at a day subsequent to the making of the contract, *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20; see also *Boydell v. Drummond*, 11 East, 142, stated *ante*, p. 283; [if not the next day, see the direction and observations of Willes, J., *Cawthorn v. Cordrey*, 13 C. B. N. S. 406]. So also must a contract for payment of an annuity, though it may determine within the year by the death of the annuitant. *Sweet v. Lee*, 4 Sc. N. R. 77; 3 M. and Gr. 452, S. C.; or a contract for more than one year's service, though subject to the like contingency. *Giraud v. Richmond*, 2 C. B. 835; [or though determinable within a year by notice, *Dobson v. Collis*, 1 H. & N. 81; *ex parte Acraman*, 31 L. J. Cha. 741.]

It was hinted in *Bracegirdle v. Heald*, and decided in *Donellan v. Read*, 3 B. & Ad. 899, that an agreement is not within the statute, provided that all that is to be done by one of the parties

is to be done within a year. There the defendant was tenant to the plaintiff, *under a lease of twenty years*, and, in consideration that the plaintiff would lay out 50*l.* in alterations, the defendant promised to pay an additional 5*l.* a year *during the remainder of the term*. The alterations were completed within the year, and an action being brought for the increased rent, it was objected among other things, that the contract could not possibly be performed within a year, and therefore ought to have been in writing. The court however held that it was not within the statute. "We think," said Littledale, J., delivering the judgment of the court, "that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer time than a year: and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part." See *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433; [*Souch v. Strawbridge*, 2 C. B. 808, *per* Tindal, C. J.; and *Green v. Saddington*, 7 E. & B. 503.]

It may be observed on this decision, that the contrary seems to

have been taken for granted in *Peter v. Compton*, and others of the older cases; for instance, in *Peter v. Compton*, there would have been no occasion to argue the question, whether the possibility that the plaintiff's marriage might not happen for a year brought the case within the statute or no, if the payment of the guinea, which took place immediately, had been considered sufficient to exempt the agreement from its operation. It may be further observed, that the decision in *Donellan v. Read*, makes the word *agreement* bear two different meanings in the same section of the Statute of Frauds: the words of the 4th section are—"That no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of any lands, tenements, or hereditaments, or any interest in, or concerning them; or upon any *agreement* that is not to be performed within the space of one year from the making thereof; unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person there-

unto by him lawfully authorised." Now, it is clear, that the word *agreement*, when lastly used in the section, means what is to be done *on both sides*: and it [was] frequently, [before the 19 & 20 Vict. c. 97,] held upon that very ground, that guaranties [were] void, if they [did] not contain the consideration as well as the promise. *Wain v. Warlters*, 6 East, 10; *Jenkins v. Reynolds*, 3 B. & B. 14; *Saunders v. Wakefield*, 4 B. & A. 595; *Sykes v. Dixon*, 9 A. & E. 693; 1 Wms. Saund. 211, *in notis*; the notes to *Birkmyr v. Darnell*, *ante*; [and see *Shadwell v. Shadwell*, 9 C. B. N. S. 159; 30 L. J. C. P. 145;] but a much more confined sense appears to be bestowed upon the word *agreement* when it is held, that an *agreement* is capable of being executed within a year, where one part only of it is capable of being so. In the case put by Mr. Justice Littledale, of goods delivered immediately, to be paid for after the expiration of a year, great hardship certainly would be inflicted on the vendor, if he were to be unpaid, because he could not show a written agreement. But it [might] be worthy of consideration, [supposing *Donellan v. Read* could be considered a doubtful authority,] whether, even if he were to be prevented from availing himself of the special contract under which he sold the goods, he might not still sue on a *quantum meruit*. See *Teal v. Auty*, 2 B. & B. 99; 4 Moore, 542; *Earl of Falmouth v. Thomas*, 1 C. & M. 109; *Knowles v. Mitchell*, 13 East, 249; [*Green v. Saddington*, 7 E. & B. 503; as to an account stated, see *Cocking v. Ward*, 1 C. B. 858; *Laycock v. Pickles*, 33 L. J. Q. B. 43]. In *Boydell v. Drummond*, 11 East, 159, it is expressly settled that *part performance* will not take an agreement out of the statute, and that upon principles which seem not inapplicable to the question in *Donellan v. Read*. "I cannot," said Lord Ellenborough, "say that a contract is *performed*, when a great part of it remains *un-performed* within the year; in other words, that *part-performance* is *performance*. The mischief meant to be prevented by the statute, was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it." (See *Smith v. Westall*, L. Ray. 316.) These observations seem applicable in full force to such a case as *Donellan v. Read*. The performance of one side of the agreement within the year could not be said to be more than part-performance of the agreement; and the danger that witnesses may die, or their memories fail, seems to be pretty much the same in every case where an agreement is to be established, after the year is past by *parol evidence*. Indeed, if there be any difference at all in the danger of admitting oral testimony

after the year, it seems greater in a case where one side of the agreement only has been performed, than in such a case as *Boydell v. Drummond*; since, where the agreement has been partially performed on both sides, as in the latter case, a witness giving a false or mistaken account of its terms, would have to render his tale consistent with what had been done by *both* the contractors; whereas, if the part-performance had been on one side only, the witness would only have to make his tale consistent with what had been done upon that side. It is true that, in *Donellan v. Read*, there was a part-performance on both sides; but so there was in *Boydell v. Drummond*: and the reason assigned for the decision in *Donellan v. Read*, viz. that the whole of one side of the agreement was performable within the year, would equally apply in a case where there had been, and could be, no part-performance on the other side for twenty years. It seems, however, too late to question the correctness of that decision. *Cherry v. Heming*, 4 Exch. 631. [In cases falling within the 4th branch of the 4th section of the statute, it should seem that the performance of those terms which directly bring the case within the statute will not have the effect of taking the case out of the statute with regard to the other terms. See *Hodgson v. Johnson*, 28 L. J. Q. B. 88, distinguishing *Green v. Saddington*, 7 E. & B. 503, as a case in which there were held to be separable contracts.]

CUMBER v. WANE.

TRINITY.—5 GEO. 1.

[REPORTED 1 STRANGE, 426.]

Giving a note for 5l. cannot be pleaded as a satisfaction for 15l.

If one party die during a Curia advisari vult, judgment may be entered nunc pro tunc.

ERROR *e* C. B. in an *indebitatus assumpsit*, for 15l. The defendant pleads, that he gave the plaintiff a promissory note for 5l. in satisfaction, and that the plaintiff received it in satisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred. And, after judgment for the plaintiff, it was objected on error, that the plea was ill, it appearing that the note for 5l. could not be a satisfaction for 15l., and that where one contract is to be pleaded in satisfaction of another, it ought to be a contract of a higher nature. Hob. 68; 2 Keb. 804. One bond cannot be pleaded in satisfaction of another. 1 Mod. 225; 2 Keb. 851. Even the actual payment of 5l. would not do, because it is a less sum. 5 Co. 117; 1 Leon. 19. Much less shall a note payable at a future day.

E contra. It was argued, that the plaintiff's demand consisting only in damages, it was for his benefit to have it reduced to a certainty, and *to have the security for it made negotiable*.* A stated account may be pleaded in bar of an action of covenant. 4 Mod. 43; 1 Mod. 261; 1 Roll. Abr. 122. Formerly indeed executory promises were not held a satisfaction, but the contrary has been

* This argument was considered valid in *Sibree v. Tripp*, 15 M. & W. 23.

* See *Crofts v. Harris*, Carth. 187; *Parslow v. Baile*, Salk. 76; *Freeman v. Bernard*, Salk. 69; but see *Allen v. Milner*, 2 Tyrwh. 113. [S. C. 2 C. & J. 47.]

(a) See *Pritchard v. Hitchcock*, 6 Sc., N. R., 851; [S. C. 6 M. & G. 151] where an issue joined upon the [plea] of payment in satisfaction was sustained by evidence that the payment relied upon was void, as being a fraudulent preference, and that the assignees had recovered the amount. [And see *Bell v. Buckley*, 11 Exch. 631.]

(b) *Taylor v. Baker*, 5 Mod. 136. But the present case was denied to be law in *Hardcastle v. Howard*, H. 26 Geo. 3. Vide 2 Term Rep. 28. [But see post p. 303.] See also *Kearslake v. Morgan*, 5 Term Rep. 513. (c) *Craven v. Henley*, Barnes, 255; *Astley v. Reynolds*, Str. 917; *Tooker v. Duke of Beaufort*, 1 Burr. 147; *Sir John Trelawney v. Bishop of Winchester*, Ib. 226, S. P. Vide also 1 Leon. 287; 1 Sid. 462; 1 Vent. 58. 90. But *Blackhall v. Heat*, Com. Rep. 13, *contra*.

since adjudged, Raym. 450; Salk. 76. And now it is held that an award before performance is a bar of the former action.*

Et per Pratt, L. C. J. (on consideration). We are all of opinion that the plea is not good, and therefore the judgment must be affirmed. As the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agrees to accept; and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case (a). If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment. Nay, in all instances the bettering his case is not sufficient, for a bond with sureties is better than a single bond, and yet that will not be a satisfaction. 1 Brownl. 47. 71; 2 Roll. Abr. 470. The judgment therefore must be affirmed (b).

Then it was alleged, that, since the time when the court took to advise, the defendant in error was dead; and therefore they prayed, that they might enter the judgment *nunc pro tunc*, as was done in the case of *Baller v. Delander*, Trin. 1 Geo. in B. R., which was ordered accordingly (c).

THE main point in this case, viz. that a security of equal degree for a smaller sum, if it present no easier or better remedy,* cannot be pleaded in an action for the larger one, has frequently been affirmed since the decision of *Cumber v. Wane*; although the doctrine laid

down by Pratt, C. J., in delivering the judgment of the court, has not been to its full extent sustained, *Sibree v. Tripp*, 15 M. & W. 23. In *Fitch v. Sutton*, 5 East, 230, the action was *indebitatus assumpsit* for goods sold and delivered. *Plea, non assumpsit*.

At the trial it appeared that the defendant, who owed the plaintiff 50*l.*, had compounded with his creditors, and paid them seven shillings in the pound, and, at the time of such payment to the plaintiff, promised to pay him the residue of his debt, when he should be of ability so to do, which he was proved to have been before this action brought. On the other hand, the defendant produced a receipt signed by the plaintiff, for the composition, and which purported to be in full of all demands. And it was urged that the receipt was either a discharge of the promise, or that the promise itself was void, as being a fraud upon his other creditors, or that, at all events, the plaintiff ought not to have declared upon the original cause of action, but specially upon the new promise to pay when of ability. But the court *in banc* after a verdict for the defendant, made a rule for a new trial absolute on the express grounds that the acceptance of 17*l.* 10*s.* could not be a satisfaction for a debt of 50*l.* "There must be some consideration," said Lord Ellenborough, "for the relinquishment of the residue, something collateral, to show the possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*. But the mere promise to pay the rest, when of ability, puts the plaintiff in no better condition than he was before. It was expressly determined

in *Cumber v. Wane*, that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me, in argument in *Heathcote v. Crookshanks*, to have been denied to be law, and in confirmation of that Mr. Justice Buller afterwards referred to a case, stated to be that of *Hardcastle v. Howard*, H. 26 G. 3, yet I cannot find any case of that sort, and none has been now referred to: on the contrary, the authority of *Cumber v. Wane* is directly supported by *Pinnell's Case*, which never appears to have been questioned." The other judges concurred, and Lawrence, J., referred to Co. Litt. 212. b., and to *Adams v. Tapling*, 4 Mod. 88, as confirmatory of the same doctrine, in the former of which it was laid down that "where the condition is for payment of 20*l.* the obligor or feoffor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance, *under his seal*, in full satisfaction of the whole, it is sufficient by reason the deed amounteth to an acquittance of the whole. If the obligor or lessor pay a lesser sum, either *before the day*, or at *another place*, than is limited by the condition, and the obligee or feoffee receiveth it, this

is a good satisfaction." (See the cases on this point collected Selw. N. P. Debt on Bond; and see *Worthington v. Wigley*, 3 Bing. N. C. 454.)

Fitch v. Sutton is stated thus at length, because it is perhaps more frequently referred to than any other case upon this subject; the doctrine there laid down, viz. that a similar security for a smaller debt cannot be pleaded in satisfaction of a larger one, has been frequently affirmed, both before and since. See *Heathcote v. Crookshanks*, 2 T. R. 24; *Pinnell's Case*, 5 Rep. 117; *Lynn v. Bruce*, 2 H. Bl. 317; *Thomas v. Heathorn*, 2 B. & C. 477; 3 D. & R. 647, S. C.; *Mitchell v. Cragg*, 10 M. & W. 367, where to a demand for 16*l.* a plea stating an agreement to set off 4*l.* and the price of a horse in satisfaction was considered bad because the price of the horse might have been less than the difference. And though it was once ruled at *Nisi Prius*, that a creditor who had given a receipt in full of all demands would be thereby precluded from insisting afterwards upon any demand prior to such receipt; *Alner v. George*, 1 Camp. 392; yet it is clear, both upon general principle, and from the decisions in *Fitch v. Sutton*, and other cases, that such an instrument, not being an estoppel, cannot prevent the plaintiff from insisting that part of his demand remains unsatisfied. See *Graves v. Key*, 3 B. & Ad. 313; *Skaipe v.*

Jackson, 3 B. & C. 421; *Stratton v. Rastall*, 2 T. R. 366; [and the explanation of *Alner v. George* in *Bowes v. Foster*, 2 H. & N. 779.]

It must be observed, that later cases seem to have engrafted on the doctrine, that a smaller sum can be no satisfaction for a larger one payable in the same manner, this distinction, that although, where there is a liquidated debt, the rule laid down in *Cumber v. Wane* prevails, yet, if there be not a liquidated debt, but an unliquidated demand of pecuniary damages, in that case the acceptance of a smaller sum than the plaintiff may have originally claimed will be a satisfaction of his whole demand, and a good answer to an action in respect of it. This distinction seems to have originated in the case of *Longridge v. Dorville*, 5 B. & A. 117; it was discussed in *Watters v. Smith*, 2 B. & Ad. 889, and *Haigh v. Brookes*, 10 A. & E. 309, and approved in *Wilkinson v. Byers*, 1 A. & E. 106. This was an action of *assumpsit*; the declaration stated that T. R., as the defendant's attorney, had sued the plaintiff in the Palace Court for 13*l.* 10*s.*, which action was depending; and thereupon, in consideration that the plaintiff would pay the defendant the 13*l.* 10*s.*, the defendant promised the plaintiff to settle with the said attorney for the costs of the action, and indemnify the plaintiff against them; that plaintiff accordingly

paid the 13*l.* 10*s.*; but that defendant neglected to settle with the attorney, who proceeded with the action and signed judgment against the plaintiff, who was obliged to pay 7*l.* 10*s.* costs, and 3*l.* in endeavouring to set aside the judgment. At the trial, it appeared that *Byers*, the present defendant, was a wood-turner, who had done work for *Wilkinson*, the present plaintiff, to recover a compensation for which the action had been brought. A verdict was found for the plaintiff, subject to the opinion of the court, upon the question, whether, as the payment of 13*l.* 10*s.* was a payment in discharge of an admitted debt, it could be any consideration for the defendant's promise to indemnify the plaintiff against the costs of the Palace Court action. The court held that the verdict was right. "The case," said Parke, J., "may be decided shortly on this ground. If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt; but where the debt is unliquidated, it is sufficient. Now, here we cannot say that there was originally any certain demand. A jury, if asked, could not, in my opinion, have said so. In the

great majority of actions of this nature, for work, labour, and goods sold, it is not a specific sum that forms the subject matter of the action; and, unless that could have been shown in the present case, there was a good consideration for the promise." *Vide tamen per* Littledale, J., in *Wright v. Acres*, 6 A. & E. 729. The principle laid down in *Longridge v. Dorville* was approved of in *Atlee v. Backhouse*, 3 M. & W. 651, *per* Parke, B. And in *Sibree v. Tripp*, 15 M. & W. 23. In *Down v. Hatcher*, 10 A. & E. 121, a plea of payment of 6*l.* 10*s.* in satisfaction of 200*l.* was held bad after verdict. No reason is assigned for the decision, but probably it may have proceeded on the ground that the plaintiff's demand (which was for use and occupation agistment and on an account stated) was, *primâ facie*, to be considered liquidated, and, that if the amount was in dispute at the time of the accord, that ought to have been pleaded specially; in *Wilkinson v. Byers*, it will be remembered that the special matter appeared on the declaration. The case of *Down v. Hatcher* was doubted by Parke, B., in *Cooper v. Parker*, 15 C. B. 822.

In *Edwards v. Baugh*, 11 M. & W. 641, the declaration stated that disputes were pending between plaintiff and defendant as to whether defendant was indebted to plaintiff in 173*l.* 2*s.* 3*d.* for money lent, &c., and that, in consideration

that the plaintiff would promise the defendant not to sue him for it, and would accept 100*l.* in satisfaction, the defendant promised to pay him 100*l.* This was held bad on general demurrer, Lord Abinger saying that it might have been sufficient had the declaration shown some debt due and a dispute as to the amount. See *per* Parke, B., *Sibree v. Tripp*, 15 M. & W. 36. Accordingly, where the declaration stated unsettled accounts and disputes concerning them, and mutual claims to the balance, and that in consideration that the plaintiff would relinquish all claims against the defendant, he promised, &c., it was held sufficient, *Llewellyn v. Llewellyn*, 3 Dowl. & L. 318, Patteson, J. [and in *Cook v. Wright*, 1 B & S. 559; S. C. 30 L. J. Q. B. 321, where the plaintiffs, *bond fide* believing the defendant to be liable to pay them certain expenses for which he was not, and believed himself not to be, liable, threatened him with legal proceedings, and he, by way of compromise, before any actual litigation, gave them some promissory notes, there was held to be sufficient consideration for the notes.] And the suspension or abandonment of an *action* or *suit* is presumed to be a good consideration, unless the contrary distinctly appear, *Smith v. Monteith*, 13 M. & W. 427. And so is the withdrawal of a plea, according to *Cooper v. Parker*, 15 C. B. 822. See as to the effect of

statement of an account, *Callander v. Howard*, 10 C. B. 290; *Bridgman v. Dean*, 7 Exch. 199; [*Laycock v. Pickles*, 4 B. & S. 497; 33 L. J. Q. B. 43; *M'Kellar v. Wallace*, 8 Moore P. C. 378, 341; and *Perry v. Attwood*, 6 E. & B. 691.]

In *Sibree v. Tripp*, 15 M. & W. 23, the case of *Cumber v. Wane* was much observed upon, and the decision qualified to this extent, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount, the circumstance of negotiability making it, in fact, a different thing and more advantageous than the original debt, which was not negotiable. And Parke, B., observed upon *Cumber v. Wane*, and *Thomas v. Heathorn*, "The reasoning of Pratt, C. J., in the former case is certainly not correct, for we cannot inquire into the *reasonableness* of the satisfaction. But there it did not appear that the note was a negotiable one" [*quære*, see the argument]; "and the point now before the court was not made. In *Thomas v. Heathorn* it does not appear to have been a case of accord and satisfaction; although the bill accepted by the defendant was a negotiable security it does not appear that it was given by way of accord and satisfaction."

It was once thought that when, upon the dissolution of a firm, the partner who remained in trade agreed, as generally happens, to take upon himself the debts of the

late firm, a creditor of the whole body would not, by assenting to this arrangement, discharge the retiring partner from liability: a notion principally founded on the decisions in *David v. Ellice*, 5 B. & C. 196; *Lodge v. Dicas*, 3 B. & A. 611; by which, however, it was not perhaps warranted to its full extent. This doctrine, which was based on a ground similar to that on which *Cumber v. Wane* was decided, *viz.*, that there would be no consideration to the creditor for such an arrangement, had been much complained of, and at last came to be canvassed solemnly in *Thompson v. Percival*, 5 B. & Ad. 925; 3 N. & Man. 167. That was an action against James and Charles Percival, for goods sold and delivered. James pleaded bankruptcy, on which the plaintiff as to him entered a *nolle prosequi*. Charles pleaded the general issue, and at the trial it appeared that James and Charles had been in partnership, which was dissolved in the usual way, James to continue in the business, and to receive and pay all debts. At the time when notice of the dissolution was first given to the plaintiff, he had a demand on the firm, for which James told him he must look to him alone. He afterwards drew a bill on James for its amount, which was dishonoured. Upon these facts, a verdict being found for the plaintiff, the court granted a new trial, in order that the jury might be asked whether the plain-

tiff had not agreed to accept the individual liability of *James*, instead of the joint liability of *James and Charles*; and it was held that, if that question should be answered in the affirmative, the defendant would be entitled to a verdict. "Many cases," said the Lord Chief Justice, delivering the judgment of the court, "may be conceived, in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy, survivorship, or in various other ways; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry." *Acc. Winter v. Innes*, 4 Cr. & M. 109. In *Kirwan v. Kirwan*, 4 Tyrwh. 491, a similar point occurred. That case was decided upon special circumstances; but from it, as well as from *Thompson v. Percival*, the following rule may be collected: *viz.*, that mere knowledge of such an arrangement amongst members of a partnership about to be dissolved will not bind the creditor of the firm, but that his own agreement to accept the transfer of liability will; and that the question, whether he has or has not entered into such an agreement, is a question proper to be decided upon by a jury. See *Hart v. Alexander*, 2 M. & W. 484; *Powles v. Page*, 3 C. B. 16; *Lyth v. Ault*, 7 Exch. 669.

There is another class of cases also of frequent occurrence, and of great practical importance, which are exempted from the general doctrine laid down in *Cumber v. Wane*, though once supposed to fall within it; those *videlicet*, in which a debtor has induced a number of his creditors to accept a composition amounting to less than their entire demand. Such an agreement, if entered into by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them; for each, in that case, has the undertakings of the rest as a consideration for his own undertaking, *Reay v. White*, 3 Tyrwh. 596; 1 C. & M. 748, S. C.; [see the judgment in *Boyd v. Hind*, 1 H. & N. 938, where the plaintiff's agreement, if any, was not with the debtor but only with another of the creditors.] And so of an agreement to give time, *Good v. Cheeseman*, 2 B. & Ad. 328. But if one of the creditors be afterwards refused the benefit held out to him by the arrangement, it will cease to be binding on him, *Garrard v. Woolner*, 8 Bing. 258. So, if the consideration in any manner fails, the agreement is at an end. Thus, if some creditors sign on the faith that others will do so, if the others hold out, those who have subscribed already are not bound, *Reay v. Richardson*, 2 C. M. & R. 422. So if it purport to pass an interest in

lands, but want the formalities required by the Statute of Frauds, it will not bind the creditors, *Alchin v. Hopkins*, 1 Bing. N. C. 99. Nor will the debtor be entitled to the benefit of it, if he neglect to perform accurately what is to be done on his part. Thus he must tender the composition money on the appointed day; for, as Lord Ellenborough said, in *Cranley v. Hillary*, 2 M. & S. 120, the party to be discharged is bound to do the act which is to discharge him, *accord. Shipton v. Casson*, 5 B. & C. 378; *Wenham v. Fowle*, 3 Dowl. 43; *Rosling v. Mugeridge*, 16 M. & W. 181; *Evans v. Powis*, 1 Exch. 601; [*Fessard v. Mugnier*, 18 C. B. N. S. 286; 34 L. J. C. P. 125] unless, indeed, the creditor have positively refused to accept less than his original demand, in which case he is taken to have waived a tender, *Reay v. White*, 3 Tyrwh. 596; 1 C. & M. 748, S. C. See *Cooper v. Phillips*, 5 Tyrwh. 170; [and *Hazard v. Mare*, 6 H. & N. 434; S. C. 30 L. J. Exch. 97, upon the construction of 12 & 13 Vict. c. 106, s. 230.]

The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows: *viz.*, that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum*

pactum. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. See *Steinman v. Magnus*, 2 Camp. 124; 11 East, 390; *Bradley v. Gregory*, 2 Camp. 383; *Wood v. Roberts*, 2 Stark. 417; *Boothby v. Sowden*, 3 Camp. 175; *Sibree v. Tripp*, 15 M. & W. 23.

It is laid down in most of the earlier authorities, that an accord to avail *must be executed*: and that doctrine is affirmed by *Bayley v. Homan*, 3 Bing. N. C. 915. See *Allies v. Probyn*, 5 Tyrwh. 1079; *Edwards v. Chapman*, 1 M. & W. 231; *Reeves v. Hearne*, 1 M. & W. 326; *Collingbourne v. Mantell*, 5 M. & W. 292; [*Lynn v. Bruce*, 2 H. Black. 317; *Gabriel v. Dresser*, 15 C. B. 622; *Brown v. Perkins*, 1 Ha. 564.] On the other hand, it is said in Com. Dig. B. 4, "An accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party had a remedy to compel the performance." See *Good v. Cheeseman*, *ubi supr.* The rational distinction seems to be, that if the *promise* be received *in satisfaction*, it is a good satisfaction; but if the *performance*, not the *promise*, is intended to operate in satisfaction, there shall be no satisfaction without performance. See *Reeves v. Hearne*, 1 M. & W. 326; [*Buttigieg v. Booker*, 9

C. B. 689;] *per curiam Evans v. Powis*, *ubi supr.* The same distinction is made in the cases cited in the notes to *Cutter v. Powell*, vol. ii., where it is held that, where the *promise* on one side is the consideration for that on the other, *performance* is not a condition precedent to the right of action. [As to the distinction between the terms "discharge," "satisfaction," and "payment," see the cases cited in *Bottomley v. Nuttall*, 5 C. B. N. S. 134, 135; and *Carman v. Wood*, 2 M. & W. 465.]

It can hardly have failed to suggest itself to the observant reader of the principal case, that its doctrine is founded upon vicious reasoning and false views of the office of a court of law, which should rather strive to give effect to the engagements which persons have thought proper to enter into, than cast about for subtle reasons to defeat them upon the ground of being unreasonable. Carried to its full extent, the doctrine of *Cumber v. Wane* embraces the exploded notion, that in order to render valid a contract not under seal, the adequacy as well as the existence of the consideration must be established. Accordingly, in modern times, it has been, as appears by the preceding part of the note, subjected to modification in several instances. The following is an attempt to exhibit an outline of the present state of the law as to the exoneration, satisfaction, or discharge of debts or

demands [particularly those] not under seal :—

1. A person bound by a contract not under seal may, before breach, be exonerated from its performance by word of mouth, without any value or consideration. [Comyns's Dig. *Action on the case upon assumpsit*, *Dobson v. Espie*, 2 H. & N. 79.] *A fortiori*, it should seem that such exoneration may be purchased for a less amount than that contracted to be paid.

2. An unliquidated or uncertain and disputed demand overdue may be discharged by payment of any agreed sum.

3. An overdue demand, whether liquidated or unliquidated, may by agreement be discharged by payment of a thing different from that contracted to be paid, though of less pecuniary value ; for instance, a thousand pounds by payment of a peppercorn, *Pinnel's Case*, 5 Rep. 117 ; *Andrew v. Boughay*, Dyer, 756 ; or by a negotiable instrument binding the debtor, or a third person, to pay a smaller sum, *Curlewis v. Clark*, 3 Exch. 375, [and] part of a claim [may be satisfied] by the withdrawal of defence as to the residue, *Cooper v. Parker*, 15 C. B. 822. And even a new binding contract entered into by the debtor with the creditor for a new consideration, (see *Lynn v. Bruce*, 2 H. Bl. 317,) to do something different from what the debtor was bound to by his original broken contract, as, for instance,

that one of two joint debtors shall alone remain liable and pay the debt, *Lyth v. Ault*, 7 Exch. 669, may, if the new contract itself, not merely the performance of it, be agreed to be taken in satisfaction and discharge of the breach, operate according to the intention of the parties in such discharge, whether performed or not ; the remedy for its breach being a thing of some value, and being different from the original debt. *Evans v. Powis*, 1 Exch. 601 ; *Curlewis v. Clark*, 3 Exch. 375 ; *Flockton v. Hall*, 16 Q. B. 1039.

4. There is authority for saying that a liquidated demand, founded upon a bill of exchange or promissory note, even though overdue, may be forgiven by word of mouth ; and if this be law, *a fortiori*, such a demand might, with consent of the creditor, be discharged by payment of a less amount than that secured by the note. See *Foster v. Dawber*, 6 Exch. 839, in the marginal note of which, for "before" read "after" [; and the judgment of Willes, J., in *Cook v. Lister*, 13 C. B. N. S. 543.]

5. The contract or other act of a third person introducing a new consideration, may operate in discharge of a demand arising out of any sort of contract not under seal, whether liquidated or unliquidated, if so agreed between such third person and the debtor and creditor. See *Henderson v. Stobart*, 5 Exch. 99. Upon this

rests the validity of a composition with creditors, by which two or more creditors agree with one another and the debtor to take less than the full amount of their respective debts in discharge of all. And in like manner it should seem that payment by a third person, not bound by the contract, with the assent of the debtor, of the amount due, or even less, see *Welby v. Drake*, 1 C. & P. 557, may operate to discharge the whole debt, if so intended. It is said, "with the assent of the debtor," because, although by the civil law a stranger might discharge a debt by payment without the knowledge and even against the wish of the debtor; yet, according to the authorities, it should seem that, by the law of England, the precedent or subsequent assent of the debtor (if capable of assenting), is necessary to the discharge of the debt. See *Jones v. Broadhurst*, 9 C. B. 173; *Belshaw v. Bush*, 11 C. B. 191; *James v. Isaacs*, 12 C. B. 791; *Goodwin v. Cremer* [18 Q. B. 757]. *Quære*, whether such assent of the debtor ought not to be presumed, the act of payment being for his benefit? [*Cook v. Lister*, 13 C. B. N. S. 543, judgment of Willes, J.; and *Pellatt v. Boosey*, C. B., 10 May, 1862; but see *Lucas v. Wilkinson*, 1 H. & N. 420. If the debtor at the request of the creditor agrees with the creditor's creditor to be liable to the latter in place of the creditor for the

amount of the debt, this is evidence of a tripartite agreement for satisfaction of the debt, and ought to be pleaded as such averring that the creditor was a party thereto, *Cockrane v. Green*, 9 C. B. N. S. 448; 30 L. J. C. P. 97. See also *Liversidge v. Broadbent*, 4 H. & N. 603.]

6. A liquidated and undisputed money demand, of which the day of payment is past, not founded upon a bill of exchange or promissory note, cannot, even with the consent of the creditor, be discharged by mere payment by the debtor of a smaller amount in money, in the same manner as he was bound to pay the whole.

7. A contract to do an act *in futuro*, in satisfaction of a past breach of contract resulting in damages, whether liquidated or unliquidated, is revocable, and indeed inoperative, until actual performance, unless the contract itself, and not merely the performance of it is agreed to be accepted in satisfaction, *Lynn v. Bruce*, 2 H. Bl. 317; *Graham v. Gibson*, 4 Exch. 768. Yet such a contract may be enforced by action where there is a new consideration, as staying an action brought, &c., *Crowther v. Farrer*, 15 Q. B. 677; [and see *Jonassohn v. Ransome*, 3 C. B. N. S. 779, where the court allowed an executory accord to be pleaded as an equitable defence.]

8. A contract, though for valuable consideration, to suspend for a time rights of action once vested,

is not a defence at the common law, but only ground for a cross action, *Ford v. Beech*, 11 Q. B. 852; [*Webb v. Salmon*, 13 Q. B. 886, 894; 3 H. of Lords Cases, 510; *Frazer v. Jordan*, E. B. & E. 8; *Ray v. Jones*, 19 C. B. N. S. 416; 34 L. J. C. P. 306. It might be thought arguable that such a contract is a defence on equitable grounds, under the 17 & 18 Vict. c. 125, s. 83, to an action brought in violation of it; for in Chancery the breach of an express negative promise is usually restrainable by perpetual injunction. See *per* Crompton, J., in *Keyes v. Elkins*, 5 B. & S. 240; 34 L. J. Q. B. 28; *Lumley v. Wagner*, 1 De G. Mac. & G. 604; *Peto v. Brighton, &c., Rail. Co.*, 32 L. J. Cha. 900; *Norton v. Wood*, 1 Russ. & M. 178; *Same v. Same*, 21 L. J. Cha. 900; but in those cases in which the injunction would only be granted conditionally, on terms which a court of law has not jurisdiction to enforce in the action, such a contract is not an equitable defence. See *Flight v. Gray*, 3 C. B. N. S. 320; and to give effect to the defence, the right of action would be wholly destroyed, contrary to the intent of the parties; *Owens v. Pizey*, Q. B. Mich. 1862. As to agreements under seal, pleadable by way of release in the event of an action being brought for the debt, see *Gibbons v. Vouillon*, 8 C. B. 483; *Legg v. Cheesbrough*, 28 L. J. C. P. 209; *Walker v. Nevill*, 3 H. & C. 403; 34 L. J. Exch. 73. As to stipulations

which do not suspend the remedy, but qualify the original rights, see *Foley v. Fletcher*, 28 L. J. Exch. 100; or suspend the operation of agreements, *Wallis v. Littel*, 11 C. B. N. S. 369. In *Scott v. Avery*, 5 H. of Lords Cases, 811, a proviso that the assured should not be entitled to sue on his policy until the amount of his claim was ascertained by arbitration, was held to be a condition precedent and valid. This decision does not conflict with the doctrine that the courts of law cannot be ousted of their jurisdiction by the mere agreement of the parties. See also *Scott v. The Corporation of Liverpool*, 3 De G. & J. 334; *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 412; and *Horton v. Sayer*, 4 H. & N. 643; S. C. 29 L. J. Exch. 28; *Braunstein v. The Accidental Death Ins. Co.*, 1 B. & S. 782; S. C. 31 L. J. Q. B. 17; *Tredwen v. Holman*, 1 H. & C. 72; S. C. 31 L. J. Exch. 398; and *Lee v. Page*, 30 L. J. Cha. 857. For an instance of an action for the breach of an agreement to refer, see *Livingston v. Ralli*, 5 E. & B. 132; such an agreement, or the pendency of an arbitration under it, would seem not to be pleadable by way of equitable defence, *Wood v. Copper Miners' Co.*, 17 C. B. 561. However, by the Common Law Procedure Act, 1854, s. 11, if the parties to any deed or instrument in writing (*Blyth v. Lafone*, 1 E. & E. 435; *Mason v. Haddan*,

6 C. B. N. S. 526) have agreed to refer any existing (*Russell v. Pellegrine*, 6 E. & B. 1020; *Wickham v. Harding*, 28 L. J. Exch. 215) or future differences to arbitration, and an action is brought notwithstanding the agreement, the court or a judge of the court in which the action is brought may, after appearance entered by the defendant, and before plea, stay the proceedings, upon being satisfied that no sufficient reason exists why the matters agreed to be referred cannot be or ought not to be referred, and that the defendant was at the time of the suit, and still is, ready to join in the arbitration. A covenant not to sue is, in order to avoid circuity of action, pleadable as a release. See upon these points, 2 Wms. Saund. 48, 150, n. (i); *Willis v. De Castro*, 4 C. B. N. S. 216; *Greenough v. M'Leiland*, Cam. Scacc., 2 El. & El. 424; 30 L. J. Q. B. 15; the judgment in *Badely v. Vigurs*, 4 E. & B. 71; and *Giles v. Spencer*, 3 C. B. N. S. 244.]

9. With respect to contracts under seal, they in this respect differ considerably from those not under seal. Generally speaking, a liability under them could not at the common law be discharged by a mere licence not under seal even for valuable consideration, or even by accord and satisfaction before breach, *Mayor of Berwick v. Oswald*, 1 E. & B. 295; *Spence v. Healey*, 8 Exch. 668; and after breach, those claims arising out of

them which sounded in damages, and not debts accruing by the execution of the deed only, could be the subject of accord and satisfaction, *Blake's Case*, 6 Rep. 44; Selw. N. P. "Covenant," vii. 1; Bac. N. Abr. "Accord." (B). Contracts under seal, to pay liquidated amounts in money, before 4 Anne, c. 16, could only be satisfied, so as to enable the debtor to defend himself in a court of common law, by payment on the day and an acquittance under seal, which, if tendered by the debtor, the creditor was bound to execute, and a payment in part after the day was only ground of equitable relief. See *Husband v. Davis*, 10 C. B. 645, as to the effect of that statute. Since the Common Law Procedure Act, 1854, s. 83, any contract for valuable consideration, by which the parties agree either for entire and unconditional exoneration, or relinquishment of liability in respect of a contract under seal, may, it should seem, be pleaded as an equitable defence, but cannot in an action on a deed be replied to a plea denying that a discharge from performance alleged in the declaration was under seal; *The Thames Ironworks, &c., Co. v. The Royal Mail Steam Packet Co.*, 10 C. B. N. S. 375; S. C., 31 L. J. C. P. 169. The case of *Smith v. Trowsdale*, 3 E. & B. 83, in which an extension by parol of the time stipulated for the performance of a contract under seal, was upheld

upon peculiar grounds, seems to touch the extreme limit of the common law.

The second point decided in this case is an exemplification of that maxim of law—*Actus curiæ nemini facit injuriam*, for the delay is the act of the court, therefore the parties should not suffer by it. *Acc. Toulmin v. Anderson*, 1 Taunt. 385. See *Lanman v. Lord Audley*, 2 M. & W. 535; *Vaughan v. Wilson*, 4 Bing. N. C. 116. *Evans v. Rees*, 12 A. & E.

167; *Miles v. Bough*, 3 Dowl. & L. 105; *Harrison v. Heathorn*, 6 Scott. N. R. 794; [*Miles v. Williams*, 9 Q. B. 47.] *Moor v. Roberts*, 3 C. B. N. S. 844. The practice only prevails in cases of delay by the act of the court; *Wilkes v. Parks*, 5 M. & Gr. 376; 6 Sc. N. R. 42, S. C.; *Fishmongers' Co. v. Robertson*, 3 C. B. 970; [*Seymour v. Greenwood*, 30 L. J. Exch. 189; *Heathcote v. Wing*, 25 L. J. Exch. 23.]

ARMORY v. DELAMIRIE.

HILARY, 8 G. 1.—IN MIDDLESEX, CORAM PRATT, C. J.

[REPORTED 1 STRANGE, 504.]

*The finder of a jewel may maintain trover for a conversion thereof by a wrong-doer.**

A master is answerable for the loss of a customer's property intrusted to his servant in the course of his business as a tradesman.

Where a person who has wrongfully converted property will not produce it, it shall be presumed as against him, to be of the best description.

THE plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under a pretence of weighing it, took out the stones, and calling to the master to let him know it came to three-halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action will lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

* [A good instance of the application of this principle will be found in *Bourne v. Fosterbrook*, 34 L. J. C. P. 164. The place of the finding is immaterial. *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75; see *R. v. Pierce*, 6 Cox. Cr. C. 107, where a party discovering in a railway carriage articles left there by a passenger was considered not to be a finder; a finder is not a bailee, *Merry v. Green*, 7 M. & W. 623; *R. v. Thomas*, 33 L. J. M. C. 32. As to the criminal liability of a finder appropriating the goods, see *R. v. Moore*, 30 L. J. M. C. 77; *R. v. Gardner*, 32 L. J. M. C. 35.]

1 Com. Dig. Action upon trover (B) 310.

3. As to the value of the jewels, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the *Chief Justice* directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

THIS is the case usually referred to for the purpose of illustrating that leading principle of law, that bare possession constitutes a sufficient title to enable the party enjoying it to obtain legal remedy against a mere wrong-doer. It would be almost a waste of time to enumerate the modern decisions by which this proposition is enforced and explained. Two of the most remarkable are, *Sutton v. Buck*, 2 Taunt. 302; and *Burton v. Hughes*, 2 Bing. 173, where property having been lent to the plaintiff under a written agreement, it was nevertheless held that he might maintain trover for it without producing that agreement; for though, if it had been necessary to prove the nature of his interest in it, the rules of evidence would have rendered the production of the writing indispensable, still as possession is a sufficient title against a wrong-doer, it was sufficient to show his possession without inquiring into the terms of it. The qualified right of a bankrupt or insolvent to *after acquired* property also

strikingly illustrates this position. *Herbert v. Sayer*, 5 Q. B. 965. See also *Matson v. Cook*, 4 Bing. N. C. 392; *Elliott v. Kemp*, 7 M. & W. 306; [*Bridges v. Hawksworth*, 21 L. J. Q. B. 75; *Harper v. Charlesworth*, 4 B. & C. 574; *Northam v. Bowdley*, 11 Exch. 70; *Every v. Smith*, 26 L. J. Exch. 344; *Jeffries v. Great Western Rail. Co.*, 5 E. & B. 802; *Buckley v. Gross*, 3 B. & S. 566; 32 L. J. Q. B. 129; *Bourne v. Fosbrooke*, 18 C. B. N. S. 515; 34 L. J. C. P. 164.]

Formerly the right of the plaintiff in trover to the possession of the goods always came in question under the plea of not guilty; but by Reg. Gen. Hil. 1836, [and now by Reg. Gen. Hil. 1853, r. 20,] if the defendant deny the plaintiff's title to the goods, he must plead specially. Since these rules, it has been held, in conformity with the doctrine laid down in the principal case, that "the plea of no property in the plaintiff, means no property as against the defendant." *Per Parke, B.*, in *Nicholls v. Bastard*, 2 C. M. & R. 662; and

quære as to the case of *Howell v. White*, 1 M. & Rob. 400. See *Leake v. Loveday*, 4 M. & Gr. 980; 5 Sc. N. R. 908, S. C.; *Mayhew v. Herrick*, 7 C. B. 229. [So also in actions for trespass to land, the defendant may, under a traverse of the plaintiff's property, show that the plaintiff was not entitled to the possession of it as against him, *Jones v. Chapman*, 2 Exch. 803. "I agree," said Maule, J., in that case, "that the question raised by the issue of 'not possessed' is whether the plaintiff was in actual possession or not; but it seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respects. You cannot say that it is joint possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession, and the other is a trespasser.

Then that is to be determined, as it seems to me, by the fact of the title, each having the same apparent actual possession: the question as to which of the two really is in possession, is determined by the fact of the possession following the title,—that is, by the law, which makes it follow the title." Somewhat similar in principle, is the decision in *Blades v. Higgs*, Dom. Proc. 13 C. B. N. S. 844; S. C. 34 L. J. C. P., 289, where game started and killed on the same land by a trespasser, and carried off by him, was held to be the property of the owner of the land.]

It was in consequence of the doctrine thus affirmed in *Armory v. Delamirie*, viz., that mere possession is sufficient against a wrong-doer, that it was decided in *Trevelian v. Pyne*, Salk. 107, and *Chambers v. Donaldson*, 11 East, 65, in opposition to several old authorities, that a *command* alleged in pleading is traversable. In *Trevelian v. Pyne*, the action was replevin for cattle. *Cognizance*, by the defendant as bailiff to J. S. *Plea in bar*, that defendant was not bailiff to J. S., and held good on demurrer; for though J. S. had a right to take the cattle, yet a stranger without his authority could not. *Acc. Robson v. Douglas*, Freem. 536; *George v. Kinch*, 7 Mod. 481. It was thought, indeed, long after the decision in *Trevelian v. Pyne*, that in trespass *quare clausum*

fregit, if the defendant justified under the command of A., in whom he alleged the freehold to be, the plaintiff could not in his replication traverse the command, because that would admit the freehold to be in A.; and if the freehold were in A. the plaintiff ought not to maintain his action. But this distinction is now completely exploded, for in *Chambers v. Donaldson*, 11 East, 65, the defendants to an action of trespass *quare clausum fregit*, pleaded that the *locus in quo* was the freehold of E. B. Portman, Esq., and that they by his command broke and entered the same. The plaintiff traversed the command, and on demurrer the replication was held good upon the express ground that the defendant, if he had not the command of Portman, was a wrong-doer, and that as against a wrong-doer the plaintiff's possession, even supposing him to have no title, would be sufficient to maintain the action. See *Heath v. Milward*, 2 Bing. N. C. 98; *Carnaby v. Welby*, 8 A. & E. 878; *Brest v. Lever*, 7 M. & W. 594.

On the same principle rests the well-known rule in actions of ejectment, *viz.*, that the plaintiff must recover by the strength of his own title, not the weakness of his antagonist's; for no one can recover in ejectment, who would not be entitled to enter without bringing ejectment, and any person entering on the possession of the tenant, unless he have a better title, is a

wrong-doer. [The doctrine that possession is sufficient title as against a wrong-doer, appears never to have been extended to cases in which there has not been actual possession of a specific thing. It may perhaps be laid down generally, that to rights lying in grant, and not susceptible of possession or seisin, there can be no title as against a wrong-doer where there is none against the party capable of granting such rights; excepting only where the right claimed is a natural incident of property which is in the possession of the claimant. Thus, as a mere licence confers no right at common law against the licensor, but only excuses that which, if not done under the licence, would have been a wrong to him (*Wood v. Leadbitter*, 13 M. & W. 840), the licensee of that which might have been conferred as an easement or *profit-a-prendre*, cannot, it is apprehended, maintain an action against a wrong-doer for depriving him of the benefits which he might or would have enjoyed under the licence. This seems to have been decided in a case which arose since the publication of the last edition of this work, and where it was held that the grant by the proprietors of a canal of an exclusive right to let boats for hire on it, did not confer a right of action on the grantee against other persons using the canal for the same purpose. *Hill v. Tupper*, 2 H. & C. 121. The

subject was discussed in *Whaley v. Laing*, 26 L. J. Exch. 327, not so fully reported, 2 H. & N. 472. There the declaration alleged that the plaintiffs were possessed of mines, and of engines and boilers for working them, and had and enjoyed the benefit and advantage of the waters of a canal branch near the engines and boilers to supply them with water for working them, and *that the water used and ought to run and flow without being fouled or polluted*, but that the defendant wrongfully fouled and polluted the water near the place at which the supply of it for the boilers and engines was drawn, and thereby damaged the boilers and engines, and interrupted the working of the mines. The pleas were (1) not guilty, and (2) a traverse of the allegation which is printed above in italics. This case was taken up to the Court of Error, and there, after much diversity of opinion amongst the judges, the judgment was ultimately reversed by four judges against two, on the ground that the declaration was bad in arrest of judgment, for want of any allegation to the effect that the plaintiffs were entitled to the flow or enjoyment of the benefit of the waters. See 3 H. & N. 675, 901, note (a). See also Gale on Easements, 411; 2 Wms. Saund. 113 (a) *Stocks v. Booth*, 1 T. R. 428; *Griffiths v. Matthews*, 5 T. R. 296; Bac. N. Abr.; Action on the case, F. The distinction is obvious

between such cases and those in which the plaintiff's right is *prima facie* a possessory one, as in *Jeffries v. Williams*, 5 Exch. 792, where a declaration for injury to the reversion in houses, by negligently working mines near them without leaving proper support, was held to be good, although it did not allege a right to the support, because *prima facie* the defendant was a wrong-doer (acc. *Bibby v. Carter*, 4 H. & N. 153,); and as to the nature of the right to support, see *Bonomi v. Backhouse*, E. B. & E. 622, 646, and *Hilton v. Whitehead*, 12 Q. B. 734, where a like declaration, not stating the grounds on which the plaintiff was entitled to the support, and alleging that the mines were the defendant's, was held bad, because as against the adjoining proprietor the possessory right is limited to support of the land, and that of buildings is the subject of grant or prescription. See also *Corby v. Hill*, 4 C. B. N. S. 456, where a wrong-doer was held liable to a person whose horse, while being driven along a private road, with the leave of the owners of the road, was injured by running against a dangerous obstruction, placed on the road by the wrong-doer; and see *Botch v. Smith*, 7 H. & N. 736; S. C. 31 L. J. Exch. 201; and *Robbins v. Jones*, 15 C. B. N. S. 221; 33 L. J. C. P. 1.]

In the case of *Dobree v. Napier*, 2 Bing. N. C. 781, a distinction was engrafted upon the general

rule that a command is traversable. This was an action of trespass for seizing a steam-vessel. The defendant pleaded a seizure of the vessel as a prize, by the command of the Queen of Portugal. The plaintiff replied facts, showing that the defendant was prohibited from entering the service of the Queen of Portugal by the provisions of the Foreign Enlistment Act. Upon demurrer, judgment was given for the defendant. "The only ground," said Tindal, C. J., "on which the authority of the servant is traversable at all in an action of trespass, is to protect the person or property of a party from the officious or wanton interference of a stranger, where the principal might have been willing to waive his rights. It is obvious, that the full benefit of this principle is secured to the plaintiffs, by allowing a traverse of the authority *de facto*, without permitting them to impeach it by a legal objection to its validity in another and foreign country."

And on similar reasoning seems to rest the well-known doctrine that a subsequent ratification of an act done in the name of the party who ratifies is tantamount to a prior command, nay, that it has relation back to the time of the act done, and is in point of law, and may be described in pleading as *a command*. So that, where a person, if present at the time, could lawfully command any act to be done, any other person,

though either wholly without authority, or exceeding the limits of his authority, would be justified in doing that act, provided he did it in the name, or as one acting by the authority of the person entitled, (whether to his advantage or not,) and obtained his subsequent ratification.

Two of the earliest cases in which this doctrine was discussed appear to involve nearly all its principles. In an *Anonymous Case*, Hilary Term, 7 H. 4, in the King's Bench, reported in the Year Book of 7 H. 4, Hil. 34, b., "a jury was sworn between two parties in a writ of trespass of certain cattle taken against the peace, in which the defendant had justified as bailiff for services in arrear to his lord; to which the plaintiff replied, that he was not bailiff of the lord at the time of the taking. And the plaintiff gave in evidence, that the defendant took the beasts under a claim of a heriot due to himself; so that he could not at that time have been bailiff to another. And after they were charged, Gascoigne (Lord Chief Justice) directed them, that if the defendant took the beasts under a claim of right to a heriot for himself, although the lord afterwards agreed to this taking as for services due to him, yet he could not be said to be his bailiff for that time. But if he had taken without commandment for services due to the lord, and the lord had afterwards agreed

to the taking, he should be adjudged to have acted as bailiff, although he had been on no occasion his bailiff before that taking. *Quod nota.*" So in the *Anonymous Case*, Michaelmas, 28, 29 Eliz., in the Common Pleas, reported Godbolt, 109. "In trespass the defendant did justify as bailiff unto another; the plaintiff replied that he took his cattle of his own wrong, without that that he was his bailiff. Anderson, C. J.: If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, take my goods not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself, by saying that he did it as bailiff or servant? Can he so father his misdemeanors upon another? He cannot; for once he was a trespasser, and his intent was manifest. But if one distrain as bailiff, although, in truth, he is not bailiff; if after he in whose right he doth it doth assent, he shall not be punished as a trespasser, for that assent shall have relation unto the time of the distress taken, and so is the book of 7 H. 4; and all that was agreed by Periam. Shuttleworth: What if he distrain generally, not showing his intent nor the cause wherefore he distrained, &c. ? *ad hoc non fuit responsum.* Rodes came to Anderson, and said unto him, If I having cause to distrain come to the land

and distrain, and another ask the cause why I do so, if I assign a cause not true, or insufficient, yet when an action is brought against me, I may avow or justify and assign any other cause. Anderson: That is another case, but in the principal case clearly the taking is not good to which Rodes agreed."

The ratification may be by any means showing the election of the principal to treat the act as his, as by receipt of the proceeds of a sale. *Hunter v. Parker*, 7 M. & W.; [*The Secretary and Co. of India v. Kamachee Boye Sahaba*, 7 Moore, Indian Appeal Cases, 476;] by express approbation, *Buron v. Denman*, 2 Exch. 167; [*Hazeler v. Lemoyne*, 5 C. B. N. S. 530; and see *Fitzmaurice v. Bayley*, 6 E. & B. 868; *Reuter v. Electric Telegraph Co.*, 6 E. & B. 346;] or, in some cases, even by tacit acquiescence, *The Rolla*, 6 Rob. 364, (a case resting upon peculiar grounds;) *Inglis v. De Barnard*, 3 Moore, P. C. 425; *Cameron v. Kyte*, 3 Knapp, 332; [*Wall v. Cockerell*, 29 L. J. Cha. 816.] It cannot be of an act done by a person professing at the time to act by his own authority, or an authority other than that of the ratifier; for instance, the execution creditor cannot by ratification become liable for the acts of the sheriff in professed execution of his duty as such. *Wilson v. Tummon*, 6 Scott, N. R. 894; 6 M. & Gr. 236; [*Woollen v*

Wright, 1 H. & C. 554; 31 L. J. Exch. 513, in Cam. Scacc. And the ratifier must be capable of being designated at the time of the act done. See *Watson v. Swann*, 11 C. B. N. S. 756; S. C. 31 L. J. C. P. 214; see also *Durrell v. Evans*, 6 H. & N. 660; affirmed, 1 H. & C. 174.] In order to make it binding upon the principal, it must be with full knowledge of the nature of the act committed, or with an intention to adopt that act at all events. *Freeman v. Rosher*, 13 Q. B. 780; *Eastern Counties Rail. Co. v. Broom*, 6 Exch. 314; [*Roe v. Birkenhead, &c., Rail. Co.*, 7 Exch. 36; *Gauntlett v. King*, 3 C. B. N. S. 59; but see *Hilberry v. Hatton*, 2 H. & C. 822; 33 L. J. Exch. 190.] Where the ratification is to affect the interests of third persons, it should seem that it ought to take place whilst the principal has power to do the act himself; for instance, in the case of a notice to quit, more than half a year before the expiration of the year of tenancy, *Doe v. Goldwin*, 2 Q. B. 143; [see the judgment of Martin, B., in *Ancona v. Marks*, 7 H. & N. 686,] or in the case of stoppage in transitu before the transit is at an end, *Bird v. Brown*, 4 Exch. 786, [and see *Jardine v. Wheathley*, 3 B. & S. 700; 32 L. J. Q. B. 132.] And it seems that a ratification cannot divest a right vested in possession in a third person before the ratification, see

Donnelly v. Popham, 1 Taunt. 1; *Holland v. King*, 6 C. B. 727; and *quære* whether it can make the previous act of a third person wrongful, see *Perry v. Skinner*, 2 M. & W. 471. See an instance of ratification by an executor of an act done by the direction of the testator, but after his death, *Whitehead v. Taylor*, 10 A. & E. 210; by an administrator of an act done before letters of administration, *Foster v. Bates*, 12 M. & W. 226; (see *Rogers v. Dejoncourt*, 1 Irish C., L. R. 482); by assignees of a bankrupt after action brought, of an act done before their appointment, *Hull v. Pickersgill*, 1 B. & B. 282; [by a plaintiff of the bringing an action in his name, *Ancona v. Marks*, 7 H. & N. 686. A startling doctrine as to becoming a felon (not merely an accessory after the fact) by ratification, was laid down by some of the judges in *Reg. v. Woodward*, 31 L. J. M. C. 91; but as there was no complete act of felony before the alleged ratification the case is sustainable upon this ground which Erle, C. J., and Keating, J., adopted.]

As to the second point in the principal case, that a master is answerable for the fraud or negligence of his servant in the course of his employment, see *Coleman v. Riches*, 16 C. B. 104; [*Dayrell v. Tyrer*, 28 L. J. Q. B. 52; *Patten v. Rea*, 2 C. B. N. S. 606; *Holmes v. Onion*, ib. 790; *Seymour v. Greenwood*, 6 H. & N. 359;

affirmed, 7 H. & N. 355; *Mersey Docks and Harbour Board v. Penhallow*, Cam. Scacc., 7 H. & N. 329; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. of L. Cases, 266; and as to the master's liability for the trespass of his servant, see *Goff v. Great Northern Rail. Co.*, 30 L. J. Q. B. 148; *Seymour v. Greenwood*, *ubi supra*; and *Limpus v. The London General Omnibus Co.*, 1 H. & C., 526.

As to the third point decided in this case, it is an illustration of that favourite maxim of the law, *omnia presumuntur contra spoliatorem*; which signifies that if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Thus, if a man withholds an agreement under which he is chargeable, it is presumed to have been properly stamped. *Crisp v. Anderson*, 1 Stark. 35; [see also *Attorney-General v. Dean and Canons of Windsor*, 24 Beav. 679.] So, too, if goods are sold without any express stipulation as to their price, if the vendor refuse to give any express evidence of their value, they are presumed to be worth only the lowest price for which goods of that description usually sell; unless the vendee himself be shown to have suppressed the means of ascertaining the truth, for then a contrary presumption arises, and they are taken to be of the very best

description. *Clunnes v. Pezzey*, 1 Camp. 8, *et notas*. In the case of *Braithwaite v. Coleman*, 1 Harrison, 223, the Court of King's Bench differed on the application of this principle; it was an action by the indorsee against the drawer, and the only evidence of notice of dishonour was the following statement made by the defendant:—"I have several good defences to the action; in the first place, the letter" (containing the notice of dishonour) "was not sent to me in time." A notice to produce the letter had been given but it was not produced: Lord Denman, C. J., thought, that as the defendant withheld the letter, the jury were justified in assuming, as they actually had done, that if produced it would appear to have been in time. But Littledale, Patteson, and Coleridge, J.J., thought that the letter might have been dated on the proper day, but sent by private hand, or in some way in which it would not have arrived in proper time; and that the defendant would not be bound to produce a letter, which, on the face of it, might make against him, and which he might not have evidence to explain; and a rule for a new trial was made absolute. On the other hand, in *Curlewis v. Corfield*, 1 Q. B. 814, where a letter was shown to have been sent to the defendant the day after dishonour, and the defendant, an attorney, afterwards objected the want of due present-

ment, but not that of notice, the jury on proof of a notice to produce was held warranted in inferring that the letter contained due notice of dishonour. See *Bell v. Frankis*, 4 M. & Gr. 446; *Lobb v. Stanley*, 5 Q. B. 574, [and for a further illustration of the same principle, *Mason v. Morley*, 34 L. J. Cha. 422.]

COLLINS v. BLANTERN.

EASTER.—7 GEORGE 3. C. B.

[REPORTED 2 WILSON, 341.]

Illegality may be pleaded as a defence to an action on a bond.

SHROPSHIRE *to wit.* Robert Blantern, late of Rodenhurst, in the said county, yeoman, was summoned to answer Edward Collins of a plea, that he render to him seven hundred pounds which he owes to and unjustly detains from him, &c. Whereupon the said Edward Collins, by John Leake his attorney, says, that whereas the said Robert Blantern on the sixth day of April, which was in the year of our Lord 1765, at Rodenhurst aforesaid in the county aforesaid, by his certain writing obligatory acknowledged himself to be held and firmly bound unto the said Edward Collins in the aforesaid sum of seven hundred pounds, to be paid to the said Edward Collins when he should be thereunto required; nevertheless, the said Robert Blantern (although often thereunto required) hath not paid the said seven hundred pounds to the said Edward Collins, but hath hitherto refused and still doth refuse to pay the same to the said Edward Collins, wherefore he says that he is the worse, and hath damages to the value of ten pounds, and therefore he brings suit, and so forth; and he brings here into court the aforesaid writing obligatory, which testifies the said debt in form aforesaid, the date whereof is the same day and year above mentioned.

And the said Robert, by George Greene, his attorney, comes and defends the wrong and injury, when, &c., and

Debt upon bond for 700*l.*, dated the 6th day of April, 1765. See *Unwin v. Leaper*, 1 M. & G. 748.

1st, Plea sets forth *oyer* of the obligation, wherein four others with the defendant were jointly and severally bound to the plaintiff in 700*l.*

craves *oyer* of the said supposed writing obligatory, and it is read to him in these words: *to wit*, Know all men by these presents, that we, John Walker of Forton, in the county of Stafford, yeoman, Thomas Walker of Draycott-in-the-Moor, in the said county of Stafford, yeoman, and Robert Blantern of Rodenhurst, in the county of Salop, yeoman, are held and firmly bound to Edward Collins of Brecond, in the said county of Stafford, surgeon, in the sum of seven hundred pounds of good and lawful money of Great Britain, to be paid to the said Edward Collins, or his certain attorney, executors, administrators, or assigns, for which payment, to be well and faithfully made, we bind ourselves and each and every of us jointly and severally, our and each and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals; dated this sixth day of April, in the fifth year of the reign of our sovereign lord George the Third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and sixty-five; he also craves *oyer* of the condition to the said supposed writing obligatory, and it is read to him in these words; *to wit*, The condition of this obligation is such, that if we, the above-bounden John Walker, Thomas Walker, and Robert Blantern, our heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the above-named Edward Collins, his executors, administrators, or assigns, the full sum of three hundred and fifty pounds of good and lawful money of Great Britain, upon the sixth day of May next, without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue; which being read and heard, the said Robert saith, that the said Edward ought not to have his aforesaid action thereof against him the said Robert, because he says that the said supposed *writing obligatory is not his deed*, and of this he put himself upon the country, &c. And for further plea in this behalf, the said Robert, by leave of the court here for this purpose first had and obtained,

And also *oyer*
of the condi-
tion for the
payment of
350*l.* to the
plaintiff on the
6th of May
next.

Non est factum
pleaded.

according to the form of the statute in such case made and provided, says that the said Edward ought not to have his aforesaid action thereof against him, because he says that before, and at the time of the making of the above-mentioned supposed writing obligatory, and also before and at the time of the making of the promissory note hereafter mentioned, *to wit*, at Rodenhurst aforesaid, the said John Walker and Thomas Walker in the said supposed writing obligatory named, and also one Robert Walker, one Thomas Scillitoe, and one John Cullick, stood respectively indicted in a due course of law on the prosecution of one John Rudge, by five several and respective indictments, for wilful and corrupt perjury, to which said several and respective indictments the said John Walker, Thomas Walker, Robert Walker, Thomas Scillitoe, and John Cullick, had respectively pleaded the several pleas of not guilty before the making of the said supposed writing obligatory, and also before the time of the making of the said note hereafter mentioned; and the traverses of the said John Walker, Thomas Walker, Robert Walker, Thomas Scillitoe, and John Cullick respectively on the respective indictments were, at the time of the making of the unlawful, wicked, and corrupt agreement hereafter mentioned, and of the note hereafter mentioned, and also of the above supposed writing obligatory, *to wit*, on the day whereon the said supposed writing obligatory was made, about to come on to be tried at the assizes then, *to wit*, on that day, being, and continuing to be, held at Stafford for the county of Stafford, and that the said John Walker, Thomas Walker, Robert Walker, Thomas Scillitoe, and John Cullick, so standing indicted on the prosecution of the said John Rudge, and the said traverses so being about to be tried as aforesaid, it was on the said sixth day of April in the year 1765, in the said writing obligatory mentioned, *to wit*, at Rodenhurst aforesaid, unlawfully, wickedly, and corruptly agreed by and between the said John Rudge, the prosecutor of the indictments aforesaid, the said Edward Collins the plaintiff, and the said John Walker, Thomas Walker

2ndly, The defendant pleads, that before and at the time of making the bond, and the note after mentioned, two of the obligors, John and Thomas Walker, and three others, stood indicted by John Rudge, on five indictments, for wilful and corrupt perjury, and had severally pleaded Not guilty before the making of the bond and note. And the several traverses on the indictments at the time of making the unlawful agreement after mentioned, and the note and the said bond, viz. on the same day the bond was made, were about to come on to be tried at Stafford. Whereupon it was then corruptly agreed between Rudge the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give the prosecutor Rudge his note for 350*l*. in consideration for not appearing to give evidence at the trial of the said traverses.

And that the obligors should execute the bond to the plaintiff of the same date as the note as an indemnity to the plaintiff for giving such note.

The plaintiff gave to Rudge the prosecutor the note for 350*l.*,

Robert Walker, Thomas Scillitoe, and John Cullick, the defendants in these respective indictments, that the said Edward Collins the now plaintiff should give to the said John Rudge, the prosecutor of the indictments aforesaid, his note in writing, commonly called a promissory note, as and for value received, to bear date on a certain day and in a certain year now past, *to wit*, on the day and year last mentioned, for a large sum of money, *to wit*, the sum of three hundred and fifty pounds, payable to the said John Rudge thereafter, *to wit*, one month after the date thereof, as a consideration for his the said John Rudge's not appearing to give evidence as prosecutor on the trial of any or either of the traverses aforesaid, against any or either of the defendants, and that in consideration thereof the said John Rudge should not, nor would appear at the trial of the traverses aforesaid as prosecutor and should not, nor would give evidence on any or either of the said indictments against any or either of the parties so standing indicted as aforesaid, and that the said John Walker, Thomas Walker, and Robert Blantern the now defendant should seal, and as their deed deliver unto the said Edward Collins their bond or obligation of the same date with the said note in the penal sum of seven hundred pounds, with a condition thereunder written for the payment of three hundred and fifty pounds on the sixth day of May then next and now elapsed, as an indemnity to him the said Edward Collins for the giving of such note ; and the said Robert Blantern further saith, that in pursuance and in part performance of the said unlawful, wicked, and corrupt agreement, the said Edward Collins did then and there, before the trial of the said traverses, or of any or either of them, *to wit*, on the said 6th day of April in the year 1765 aforesaid, at Rodenhurst aforesaid, make, give, and deliver unto the said John Rudge his certain note in writing, commonly called a promissory note, bearing date as aforesaid, *to wit*, on the day and in the year last mentioned, for the sum of three hundred and fifty pounds, as for value received, payable to the said John Rudge thereafter, *to wit*, one month after the date thereof, according

to the tenor and effect of the agreement aforesaid, as a consideration for his the said John Rudge's not appearing as prosecutor, and for his not giving evidence as prosecutor on the trial of any or either of the traverses aforesaid, against any or either of the parties so indicted as aforesaid; and that in pursuance of the said unlawful, wicked, and corrupt agreement, and according to the tenor and effect thereof, the said John Rudge then and there accepted, had, and received the said note of and from the said Edward Collins for the purpose aforesaid, and in part performance of the aforesaid unlawful, wicked, and corrupt agreement; and that in further pursuance and completion of the said unlawful, wicked, and corrupt agreement, and according to the terms and effect thereof, the said John Walker, Thomas Walker, and Robert Blanterm the now defendant, did then and there immediately after the giving of the said note, and before the trial of the traverses aforesaid, or of any or either of them, *to wit*, on the said 6th day of April in the year 1765 aforesaid, seal, and as their deed deliver unto the said Edward Collins the said writing now brought here into court, with the condition above specified, as an indemnity to him the said Edward Collins for the giving of such note so given for the cause aforesaid; and the said Robert Blanterm further saith, that the said Edward Collins then and there at the time of the giving of the said note to the said John Rudge well knew for what cause and consideration the same was so given, and that the said Edward Collins, at the time of the sealing and delivering to him of the writing now brought here into court, took, accepted, and received the same of and from the said John Walker, Thomas Walker, and Robert Blanterm the now defendant, as an indemnity against the aforesaid note, with this, that the said Robert Blanterm doth aver, that the said supposed writing obligatory now brought here into court was given for such consideration as aforesaid, and no other whatsoever; and that he the said Robert Blanterm and the said John Walker and Thomas Walker mentioned in the said supposed writing obligatory were not, nor were, or was any or either

for not appearing as prosecutor and giving evidence.

And that the obligors on giving the note executed this bond,

as an indemnity to the plaintiff for giving such note.

An averment that the bond was given for the said consideration, and no other.

And that the obligors were not indebted to the plaintiff, and therefore the bond is void in law; *et hoc, &c.*

3rd, Plea that the bond was given by the obligors to indemnify the plaintiff against a note given by him to the prosecutor, and that the plaintiff has not been damnified by the note; *et hoc, &c.*

of them, at the time of the making of the aforesaid note, or at the time of the sealing or delivering of the said supposed writing obligatory to the said Edward Collins, or at the time of his acceptance of the said supposed writing obligatory, in anywise indebted to the said Edward Collins or to the said John Rudge in any sum of money, or in any other respect whatsoever; and so the said Robert Blantern saith, *that the said supposed writing obligatory* so made and given by them the said Robert Blantern, John Walker, and Thomas Walker, for the cause aforesaid, *is void in law*, and this he is ready to verify; wherefore he prays judgment if the said Edward Collins ought to have his aforesaid action thereof against him, &c. And for further plea in this behalf, the said Robert Blantern by like leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said Edward ought not to have his aforesaid action thereof against him, because he says that the said supposed writing obligatory was given by the said Robert Blantern, John Walker, and Thomas Walker, to the said Edward, *to wit*, at Rodenhurst aforesaid, to indemnify the said Edward against a certain note in writing of the said Edward's, commonly called a promissory note, then, *to wit*, on the said sixth day of April in the year 1765 aforesaid, *to wit*, at Rodenhurst aforesaid, given by the said Edward Collins to the said John Rudge, as for value received, bearing date on a certain day and in a certain year now past, *to wit*, on the day and year last aforesaid, whereby the said Edward promised to pay to the said John Rudge a certain sum of money, *to wit*, the sum of three hundred and fifty pounds, as for value received, at a certain time thereafter, *to wit*, one month after the date of the said note, which said note still remains unpaid, and that the said Edward Collins hath not been in anywise damnified by means of the said note, or of the giving of the same; and this the said Robert Blantern is ready to verify; wherefore he prays judgment if the said Edward ought to have his aforesaid action thereof against him, &c.

JOHN GLYNN.

And the said Edward Collins, as to the said plea of the said Robert by him first above pleaded in bar, and whereof he hath put himself upon the country, says that he the said Edward doth the same likewise; and the said Edward, as to the said plea of the said Robert, by him secondly above pleaded in bar, says that he, by reason of anything by the said Robert above in that plea alleged, ought not to be barred from having and maintaining his said action against the said Robert, because he says that the same plea, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said Edward from having his said action against the said Robert, to which said plea, in manner and form above pleaded, the said Edward Collins hath no need, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore, for want of a sufficient plea in this behalf, the said Edward Collins prays judgment and his debt aforesaid, together with his damages, by occasion of the detaining that debt, to be adjudged to him, &c.; and the said Edward Collins, as to the said plea of the said Robert by him lastly above pleaded in bar says, that he by reason of anything by the said Robert above in that plea alleged, ought not to be barred from having and maintaining his said action against the said Robert, because he says that the same plea, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said Edward from having his said action against the said Robert, to which said plea, in manner and form above pleaded, the said Edward Collins hath no need, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said Edward Collins prays judgment, and his debt aforesaid, together with his damages, by occasion of the detaining that debt, to be adjudged to him, &c.

Replication and
issue to the
1st plea.

Demurrer to
the 2nd plea.

Demurrer to
the 3rd plea.

G. NARES.

And the said Robert saith, that the said plea by him the said Robert secondly above pleaded in bar, in manner and

Joinders in
demurrer.

form as the same is above pleaded, and the matters therein contained, are sufficient in law to bar the said Edward from having his said action against the said Robert, which said plea, and the matters therein contained, he the said Robert is ready to verify and prove, as the said court shall award ; and because the said Edward hath not in any manner answered thereto, nor in anywise denied the same, he the said Robert prays judgment, and that the said Edward may be barred from having his said action thereof against him the said Robert, &c., and because the justices here will advise of and upon the premises before that they give judgment thereupon, day is given to the parties aforesaid here until ——— to hear their judgment thereupon, so that the said justices here are not yet ready to give judgment thereon ; and the said Robert further saith, that the said plea by him the said Robert lastly above pleaded in bar in manner and form as the same is above pleaded, and the matters therein contained, are sufficient in law to bar the said Edward from having his said action against him the said Robert, which said plea, and the matters therein contained, he the said Robert is ready to verify and prove, as the court shall award : and because the said Edward hath not in any manner answered thereto, nor in anywise denied the same, he the said Robert prays judgment, and that the said Edward may be barred from having his said action thereof against him the said Robert, &c.

JOHN GLYNN.

And because the justices here will advise of and upon the premises before that they give judgment thereupon, day is given to the parties aforesaid here until ——— to hear their judgment thereupon, for that the said justices here are not as yet ready to give judgment thereon ; and in order to try the issue between the parties aforesaid above joined to be tried by the country, the sheriff is commanded that he cause to come here in eight days of the purification of the blessed Mary, twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.

COLLINS v. BLANTERN.

THIS case was well argued last *Hilary* term by Serjeant *Nares* for the plaintiff, and Serjeant *Glynn* for the defendant, and in this term by Serjeant *Burland* for the plaintiff, and Serjeant *Jephson* for the defendant.

On the side of the plaintiff it was insisted that the condition of the bond being singly for the payment of a sum of money, the bond is good and lawful; and that no averment shall be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it, and therefore that the special plea is bad; upon the first argument these cases were cited for the plaintiff, Carth. 252; Comb. 121, *Thomson v. Harvey*; *Lady Downing v. Chapman*,* C. B., Mich. 6 Geo. 2 (now depending in error in B. R.); 1 Leon. 73. 203; Jenk. 106; Carth. 300; Comb. 245; *Empson v. Bathurst*, 1 Mod. 35; Hutton 52; Vent. 331; Cro. Jac. 248.]

* This case will be found reported 9 East, 414, *in notâ*.

For the defendant it was insisted, that the averment of the wicked and unlawful consideration of giving the bond might well be pleaded, although it doth not appear upon the face of the deed; and that anything which shows an obligation to be void may well be averred, although it doth not appear on the face of the bond, as *duress*: that it was delivered as an *escrow* to be delivered upon a certain condition to the obligee; *infancy*, *coverture*, or upon a *simoniacal contract*, *maintenance*, &c.; and although it is said there is a difference between bonds being void at common law and by statute, yet it is otherwise, for the common law was originally by statutes which are not now in being; the general rule, that you cannot plead any matter *dehors* the deed, doth not apply to this case; the true meaning of that rule is, that you cannot allege anything inconsistent with and contrary to the deed, but you may allege matter consistent with the deed; the bond in the present case is for the payment of money. The plea admits this, and the averment alleges upon what consideration that money was to be paid, and therefore is not inconsistent or contradictory to the condition of the bond;

this rule of pleading, applied to the cases of *simony*, *duress*, *coverture*, *infancy*, &c., is on the side of the defendant in this case. In bonds not to follow a trade the defendant may aver the consideration to avoid the bond. *Downing v. Chapman* is not like this case ; that was an averment contradictory to the condition of the bond, and amounted to a defeasance ; the present consideration is consistent with the condition, which is for payment of money, and only shows the bad consideration upon which the money was to be paid.

Upon the first argument the Lord Chief Justice broke the case, and said that this was very different from the case of *Lady Downing v. Chapman*, and therefore he would consider it wholly independent thereof ; and said, as he was then advised, he thought there was no difference between an act being void by statute or the common law, that the principle the judges heretofore have gone upon for making the distinctions (in the books) is not a sound one ; for wherever the bond is void at law or by statute, you may show how it is void by plea, and that in truth it never had any legal existence. That the statute law is the will of the legislature in writing ; *the common law is nothing else but statutes worn out by time* ; all our law began by consent of the legislature, and whether it is now law by usage or writing, it is the same thing ; a statute says such a thing shall be avoided by plea, why therefore may not a deed executed upon a consideration against the common law be avoided by plea ? In *duress*, *simony*, *infancy*, *coverture*, &c., the plea discloses that in truth there never was any obligation. The principle upon which courts of justice must go is, to enforce the performance of contracts not injurious to society ; and it would be absurd to say that a court of justice shall be bound to enforce contracts injurious to and against the public good. No man shall come into a court and say, " Give me a sum of money which I desire to have contrary to law ; " there can be no doubt but that the compounding a prosecution for wilful and corrupt perjury is a very great offence to the public, and whether it was

between some persons who are strangers to this action, it is not material.

Bathurst, Justice, (upon the breaking this case,) said, that the case of *Lady Downing v. Chapman* was not like it. Dr. & Stud. 12.
2 Vent. 107.
Godb. 29.

Gould, Justice, (upon the breaking this case,) said that he differed with the rest of the court in the judgment given in *Lady Downing v. Chapman*, and that upon the whole of that case he thought the averment that the bond *there* given was upon a wicked consideration, ought to have been admitted; he said that if this case at bar had been upon a simple contract, the court would not have hesitated a moment, but would have given judgment that it was bad; and shall the court sanctify a deed made upon a wicked consideration because it is sealed? To have a deed which ought to be to a man's good turned to evil purposes he thought very wrong, and that there was no distinction whether a deed be void at law or by statute.

Upon the second argument of the case at bar in this term, the Lord Chief Justice delivered the opinion of the whole court (and pronounced judgment for the defendant) to the following effect.

Lord Chief Justice *Wilmot*: Four questions are to be considered:

1st. Whether it doth not appear from the facts alleged in the second plea, that the consideration for giving the bond is an illegal consideration?

2nd. Whether a bond given for an illegal consideration is not clearly void at common law *ab initio*?

3rd. Supposing the bond is void, whether the facts disclosed in the plea to show it void can by law be averred and specially pleaded?

4th. If they can be pleaded: then whether this second plea is duly, aptly, and properly pleaded?

1. As to the first question, it hath been insisted for the plaintiff that he was not privy to the bargain and agreement, so as to him there appears to be nothing illegal done by him. But we are all clearly of opinion, that the

whole of the transaction is to be considered as one entire agreement ; for the bond and note are both dated upon the same day, for payment of the same sum of money on the same day ; the manner of the transaction was to gild over and conceal the truth ; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth ; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury, and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void ; what right then hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void ? They are both bad, the consideration for giving them being wicked and unlawful.

2. As to the second point, we are all of opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever ; and it is so held by all writers whatsoever upon this subject, except in one passage in Grotius, lib. 2. cap. 11. sect. 9. where I think he is greatly mistaken, and differs from Puffendorf, lib. 3. cap. 8. sect. 8. who, in my opinion, convicts the doctrine of Grotius. In Justin. Instit. lib. 3. tit. 20. *de turpi causâ*, sect. 23. *Quod turpi ex causâ promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.* And Vinnius, in his commentary, carries it so far as to say, you shall not stipulate or promise to pay money to a man not to do a crime, *Si quis pecuniam promiserit, ne furtum aut cædem faceret, aut sub conditione, si non fecerit, adhuc dicendum stipulationem nullius esse momenti ; cum hoc ipsum flagitiosum est, pecuniam pacisci quo flagitio abstineas.* Dig. lib. 1. tit. 5. Code, lib. 4. tit. 7. to the same point.

This is a contract to tempt a man to transgress the law,

to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for iniquity.* All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again, you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, O! procul este profani.* See Doct. & Stud. fo. 12, and chap. 24.

3. The third point is, Whether this matter can be pleaded? It is objected against the defendant that he has no remedy at law, but must go and seek it in a court of equity: I answer, we are upon a mere point of common law, which must have been a question of law long before courts of equity exercised that jurisdiction which we now see them exercise; a jurisdiction which never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they had been in later times: to send the defendant in this case into a court of equity, is to say there never was any remedy at law against such a wicked contract as this is: we all know when the equity part of the Court of Chancery began. I should have been extremely sorry if this case had been without remedy at common law. *Est boni judicis ampliare jurisdictionem:* and I say, *est boni judicis ampliare justitiam;* therefore, whenever such cases as this come before a court of law, it is for the public good that the common law should reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the judges of the common law courts, and that courts of equity have risen by the judges not properly applying the principles of the common law, being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law. It is now

objected as a maxim, that the law will not endure a fact *in pais de hors* a specialty to be averred against it, and that a deed cannot be defeated by any thing less than a deed, and a record by a record, and that if there be no consideration for a bond it is a gift. I answer, that the present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shows, that, in truth, the bond never had any legal entity, and if it never had any being at all, then the rule or maxim that a deed must be defeated by a deed of equal strength doth not apply to this case. The law will legitimate the showing it void *ab initio*, and this can only be done by pleading. Nothing is due under such a contract, then the law gives no action, the *debitum* never existed; as much as if it had been said it shall be void because there is no debt; but if this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to be most unreasonable and unrighteous, and therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place. What strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say, You shall not be permitted to plead the facts which clearly show it to be wicked and void! I am not for stirring a single pebble of the common law; and without altering the least tittle thereof, I think it is competent, and reaches the case before us. For my own part, I think all the cases upon acts of parliament, with respect to making bonds, &c. void, do warrant the receiving this plea and averment; there is no direction in such acts of parliament given for the form and manner of pleading in those cases; the end directs and sanctifies the means; I think there is no difference between things made void by act of parliament, and things void by the common law: statute law and common law both originally flowed from the same foun-

tain, the legislature : I am not for giving any preference to either, but if to either, I should be for giving it to the common law. If there had ever been any idea or imagination, that such a contract as this could have stood good at common law, surely the legislature would have altered it. There has been a distinction mentioned between a bond being void by statute, and at common law ; and it is said, that in the first case if it be bad, or void in any part, it is void *in toto* ; but that at common law it may be void in part, and good in part,* but this proves nothing in the present case. The judges formerly thought an act of parliament might be eluded if they did not make the whole void, if part was void. It is said, the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest. 1 Mod. 35, 36. The case of a simoniacal contract may be reached by a plea ; this proves the contract in the present case is to be avoided at common law. The two cases in Leon. I set one against the other, and lay no stress upon either ; *infancy, coverture, duress, &c.*, apply directly to this case ; the plea shows a fact, which, if true, the bond never had any legal existence at all : as to a bond being a gift, that is to be repelled by showing it was given upon a bad consideration ; you may thereby repel the presumption of donation. It has been objected, that the admission of such plea as the present will strike at securities by deed ; the answer is, that such a plea in the case of *infancy, gaming, duress, &c., &c.*, is admissible ; what is the plea of *non est factum* ? ninety-nine in one hundred of them are false ; why then is such a plea to be received, and not the present plea ? I see no reason why. I want no case to warrant my opinion, it is enough for me if there be no case against me, and I think there is not. In 1 Hen. 7, 14, 16, b. Brian was then the Chief Justice, and his opinion there is founded upon what I have now said : Brian says, "I do not see in any case in the world how a man can avoid a specialty by a bare matter of fact concerning the same

* See *post in notes*, p. 345.

1 Lev. 209.
Hard. 464.

Cr. Eliz. 623,
697.
Jenk. 108.
Moor, 564.

deed, *if so be that the deed was good at the commencement;*" but the present deed was never good. Moor, 564, is a simoniacal contract pleaded to a bond, which was held a bad plea, because *simony* was not *then* considered as contrary to our law, but at this day, *simony* being against our law, such a plea would be good. The case in Comb. 121, is nothing but an *obiter dictum* of a judge, to which I pay very little regard.

4. As to the fourth point, I think, the plea is rightly pleaded, and concludes very properly in saying, "And so the said bond is void." It seems to me that *non est factum* could not have been properly said at the conclusion of this plea after the special matter before alleged; *non est factum* means nothing but that, "I did not seal and deliver the bond;" and why *non est factum* may be pleaded by a *feme covert* I do not clearly see the reason, unless the law unites the husband and wife so closely, that it considers them as one and the same person, so that she without the husband cannot execute the deed. If two be jointly bound, and only one sued, he cannot plead *non est factum*, but ought to plead that another was bound with him. 5 Rep. 119, a. b. It is fair to tell the party what is your defence, upon what point you put your case: I think the right way is to conclude the plea as it is, *And so the said writing obligatory is void, et hoc, &c.*, and so pray judgment if the plaintiff ought to have his action, &c., and do not see how he could say *non est factum*, when he sealed the deed; but supposing the plea might have been more aptly concluded, yet it is well enough upon a general demurrer, as this is,* and we are all of opinion that judgment may be for the defendant; that the averment pleaded is not contradictory, but explanatory of the condition; that the bond was void *ab initio*, and never had any existence. Judgment for the defendant *per totam curiam*.

* By St. 4
Anne, c. 16.

THE principle established in *Collins v. Blantern*, viz. that illegality may be pleaded as a defence to an action on a deed, has been so often recognised, and is so well settled as law, that it would be useless to enter upon any long discussion respecting it. "Since the case of *Pole v. Harrobin*, E. 22 G. 3. B. R., reported 9 East, 416, n., it has been generally understood that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, *whether consistent or not with the condition of the bond*." Per Lord Ellenborough, L. C. J., *Paxton v. Popham*, 9 East, 421, 2. This, it will be remarked, carries the doctrine a step further than *Collins v. Blantern*, where the illegality averred in the plea was consistent with the condition. So, too, a covenant that lands on which an annuity was secured were worth more than the annuity, did not whilst the annuity act was in force estop the grantor from showing the reverse. *Doe d. Chandler v. Ford*, 3 A. & E. 654. See further *Prole v. Wiggins*, 3 Bing. N. C. 230. In *Paxton v. Popham*, the condition of the bond on which the action was brought stated that the defendants had borrowed of the plaintiff a sum of money, which was to run at *respondentia* interest on the security of certain goods shipped from Calcutta to Ostend, for the repayment of which on the arrival of the ship the bond

was conditioned. *Plea*, that the bond was given to cover the price of goods sold by the plaintiffs to defendants for the purpose of an illegal traffic from the East Indies, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. On demurrer the court gave judgment for the defendants. *Accord.* *Greville v. Atkins*, 9 B. & C. 462. But the illegality must [as a matter of substance] be made to appear clearly and with certainty upon the face of the *plea*. *Hill v. Manchester and Salford Waterworks Co.*, 2 B. & Ad. 552. *Mittleholzer v. Fullarton*, 6 Q. B. 989; *Smith v. Mawhood*, 14 M. & W. 452; *Simpson v. Lord Howden*, 9 Cl. & Fin. 61; *Jones v. Waite*, 9 Cl. & Fin. [101; *Ransford v. Copeland*, 6 A. & E. 482; *Royal British Bank v. Turquand*, 5 E. & B. 248.] Thus, if the statute of 9 Anne, cap. 14, against gaming, be pleaded to a bond, the *plea* must show at what game the money was lost. *Colborne v. Stockdale*, 1 Str. 493; [where the plea was held bad on demurrer to the replication.]

With respect to the different species of illegality pleadable to an action on a bond, it is impossible to do more than particularise a few of those which have actually come under discussion in reported cases. They may be divided into two classes, viz., 1. Where the illegality exists at common law; and, 2. Where it is occasioned by

the enactments of some statute. Under the first class are comprehended bonds, the conditions of which militate against public policy, see *Egerton v. Lord Brownlow*, 4 H. of Lords Cases, 1; *Hilton v. Eckersley*, [6 E. & B. 47; affirmed in error, *Ib.* 66:] such, for instance, as bonds in general restraint of trade: the leading case on which subject, *Mitchel v. Reynolds*, [follows next] in this collection. See also *Coppock v. Bower*, 4 M. & W. 361, where an agreement to withdraw an election petition, in consideration of money, was held void. As was also in *Kirwan v. Goodman*, 9 Dowl. 330, a warrant of attorney given by an attorney to induce a party to forbear proceeding against him on a penal rule; see *Exp. Critchley*, 3 Dowl. & L. 527; *Ward v. Lloyd*, 6 M. & Gr. 85; 7 Scott, N. R. 499, S. C. In *Keir v. Leeman*, 6 Q. B. 308, [affirmed in error, 9 Q. B. 371,] it is laid down that a prosecution merely for an offence which might be made the subject of a civil action, for instance, a common assault, may legally be compromised; but that if the offence be in the whole or in part of a public nature, no agreement to stifle a prosecution for it can be valid; as, for instance, if the prosecution be for an assault and riot. And a promissory note given as an inducement to forbear such a prosecution, *e. g.*, for cheating at cards, would be ordered by a court of equity to be given up;

Osbaldiston v. Simpson, 13 Sim. 513. In order, however, to invalidate a contract on such grounds, the intention to interfere with the course of public justice must distinctly appear; *Ward v. Lloyd*, *supra*. [An agreement to compromise for a sum of money a suit for a divorce upon the ground of adultery of the petitioner's wife, will not be specifically performed in Chancery, *Gibbs v. Hume*, 31 L. J. Cha. 37.] In *Simpson v. Lord Howden*, 10 A. & E. 793; 9 Cl. & Fin. 61, an agreement between shareholders of a proposed railway company and a peer, that he should withdraw all opposition and give his assent to the line, and that they should endeavour to alter the course of the line, and if the bill were passed in the then session, should in six months after it received the royal assent, pay him 5000*l.* as compensation for the damage which his property would sustain, was holden valid; it not being shown that the money was promised as a consideration for the peer's vote being given or withheld, or that the parties to the agreement intended to conceal it from other landholders on the line, or from the legislature, or that any fraud was committed or intended to be committed on anybody. [See the *Scottish North Eastern Rail. Co. v. Stewart*, 3 Macq. H. of Lords, 382; *Hare v. London and North Western Rail. Co.*, 2 Johns. & H. 80; 30 L. J.

Cha. 817; *Maunsell v. Midland, &c., Rail. Co.*, 1 H. & M. 130; 32 L. J. Cha. 513.]

A deed made in consideration of a *future* separation between husband and wife is void, *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Cocksedge v. Cocksedge*, 14 Sim. 244, though it may be otherwise where the consideration is an immediate one. *Jee v. Thurlow*, 2 B. & C. 541. In *Jones v. Waite*, 5 Bing. N. C. 341, the Court of Exchequer Chamber agreed that a husband cannot legally sell his consent to a separation, though there was a difference of opinion on the question whether the facts stated upon that record amounted to such a sale. But where separation is inevitable, a contract settling the terms on which it is to take place is lawful, *Wilson v. Muskett*, 3 B. & Ad. 743; *Jones v. Waite*, 9 Cl. & Fin. 88, [4 M. & Gr. 1104;] *Papps v. Webster*, Cam. Scac. 1848; [*Randle v. Gould*, 8 E. & B. 457;] and specific performance of such a contract may be decreed though there be no covenant by the trustees to indemnify the husband against the wife's debts, *Frampton v. Frampton*, 4 Beav. 287; *Clough v. Lambert*, 10 Sim. 174; *Jodrell v. Jodrell*, 9 Beav. 45; *Wilson v. Wilson*, 14 Sim. 405, where part of the consideration was to put an end to a suit for nullity of marriage on the ground of impotency of the husband; and the Vice-Chancellor, Sir Lancelot Shadwell,

decreed a specific performance, and restrained the husband by injunction from compelling the wife to proceed with the suit in the Ecclesiastical Court, though it was suggested that by the practice of that court no restitution of conjugal rights could be obtained pending the suit for nullity except by a proceeding in that suit. And, upon appeal to the House of Lords, notwithstanding an attack of the most general character and conducted with consummate ability upon the policy of separation deeds, the decree of the Vice-Chancellor was affirmed, and the law, it is to be hoped, at length finally settled. 1 H. of Lords Cases, 538; [*Vansittart v. Vansittart*, 4 Kay & J. 62, 27 L. J. Cha. 289, *per* Turner, L. J.; *Hunt v. Hunt*, 31 L. J. Cha. 161. In *Hunt v. Hunt*, Lord Chancellor Westbury restrained a husband from seeking restitution of conjugal rights contrary to a covenant in a separation deed. Upon appeal to the Lords the judges were summoned, and seven law lords, viz.:—Brougham, Cranworth, St. Leonards, Wensleydale, Chelmsford, Kingsdown, and the Chancellor were present at the arguments. Mrs. Hunt died during the proceedings in Dom. Proc., and no judgment was delivered. It cannot, however, be doubted that the question of the propriety of the injunction is open to discussion. Covenants in a separation deed that the husband shall part with

the control over his children are void on the ground of public policy. *Vansittart v. Vansittart*, *Walrond v. Walrond*, 1 Johns. 18, 28 L. J. Cha. 97; see however *Swift v. Swift*, 34 L. J. Cha. 394.]

Bonds given on an immoral consideration, *ex. gr.* to induce the obligee to live with the obligor in a state of fornication [are void]; *Walker v. Perkins*, 3 Burr. 1568; 1 Bl. 517; though it is otherwise, where the bond is given in consideration of past seduction, *Turner v. Vaughan*, 2 Wils. 339; *Nye v. Moseley*, 6 B. & C. 133; even though the obligor does not cease to cohabit with the obligee. *Hall v. Palmer*, 3 Hare, 532. [A mortgage in consideration of a loan made to the mortgagor, whose daughter the mortgagee had seduced, for the purpose of inducing him to allow a continuation of the intercourse was set aside in *Williams v. Bullmore*, 33 L. J. Cha. 461. A covenant in a deed of separation licensing the wife "to live as if sole and unmarried, in such a way as she may think fit, free from all restraint," does not invalidate it, *Kendall v. Webster*, 1 H. & C. 440; 31 L. J. Exch. 492. A covenant to marry no one but the covenantee is void, *Lowe v. Peers*, 4 Burr. 2225; as to conditions in a will against the marriage of testator's widow, see *Newton v. Newton*, 31 L. J. Cha. 690.]

A bond conditioned to procure subscriptions for 9000 shares in a patent, which, by its terms, was

assignable to no greater number than *five* persons, has been, before the statute allowing of such an assignment [(15 & 16 Vict. c. 83, s. 36)], held void for illegality. *Duvergier v. Fellowes*, 10 B. & C. 827; 5 Bing. 248. In *Pole v. Harrobin*, 9 East, 416, n., the bond was to secure money agreed to be given for the discharge of a person unlawfully impressed, and was held void. And so in *Arkwright v. Cantrell*, 7 A. & E. 565, was a grant conferring a judicial office on a person interested in the matters to be decided.

The illegality is equally fatal when created by statute; thus a bond will be void for contravening the provisions of 9 Anne, cap. 14, sec. 1, against gaming; see *Colborne v. Stockdale*, 1 Str. 493; *Mazzeinghi v. Stephenson*, 1 Camp. 291: those of 5 & 6 Edw. 6, c. 16, sects. 2, 3, 4; [and 49 Geo. 3, c. 126, s. 4,] against the sale of certain offices, *Layng v. Paine*, Willes, 571; *Godolphin v. Tudor*, Salk. 468; *Law v. Law*, 3 P. Wms. 391; *Hopkins v. Prescott*, 4 C. B. 578; [*Græme v. Wroughton*, 11 Exch. 146; *Eicke v. Jones*, 11 C. B. N. S. 631; *Eyre v. Forbes*, 12 C. B. N. S. 191;] those of the statutes of 31 Eliz. cap. 6, and 12 Anne, stat. 2, cap. 12, against *simony*. See the great case of *Ffytche v. The Bishop of London*, 1 East, 437, *et notas*; *Fletcher v. Lord Sondes*, 3 Bing. 501; [*Goldham v. Edwards*, 16 C. B. 437, affirmed in error, 18 C. B. 389;

Sweet v. Meredith, 31 L. J. Cha. 817; 3 Giff. 610; 32 L. J. Cha. 147;] and see st. 7 & 8 Geo. 4, c. 25, and 9 Geo. 4, c. 94; see also the whole subject elaborately discussed, *Fox v. Bishop of Chester*, 6 Bing. 1. So a bond not within the protection of the act abolishing the usury laws, 17 & 18 Vict. c. 90, is void, if it infringe the provisions of the statutes against Usury. See the notes to *Ferrall v. Shaen*, 1 Wms. Saund. 294; [and *Lane v. Horlock*, 5 H. of Lords Cases, 580. Those provisions do not apply to cases where the principal is put in jeopardy, *Howkins v. Bennett*, 7 C. B. N. S. 507. An action has been held to lie on bills given after the repeal of the usury laws, in renewal of bills made before such repeal in consideration of a loan at usurious interest, *Flight v. Reed*, 1 H. & C. 703; S. C. 32 L. J. Exch. 265, *sed quære*. The prices of butter sold in firkins not branded as required by 36 Geo. 3, c. 86, and of a building erected contrary to 18 & 19 Vict. c. 120, have been held not recoverable, *Foster v. Taylor*, 5 B. & Ad. 887; *Stevens v. Gourley*, 7 C. B. N. S. 99.] A contract to perform at an unlicensed theatre is void, *Levy v. Yates*, 8 A. & E. 129; and a contract may be illegal, although not in contravention of the specific directions of a statute, if it be opposed to the general policy and intent thereof, *Staines v. Wainwright*, 6 Bing. N. C. 174; [see *Pooley v. Quilter*, 2 De G. & J.

327; *Mare v. Sandford*, 1 Giff. 288; *Philpot v. St. George's Hospital*, 6 H. of Lords Cases, 338, 349; and *Howkins v. Bennet*, 7 C. B. N. S. 507. In *Humphreys v. Welling*, 1 H. & C. 7, a promissory note given to a debtor in consideration of a creditor withdrawing his opposition to the debtor's obtaining a final order for protection in the Insolvent Debtors' Court, was held void.] A bond given to secure payment of a debt from which the obligor had been discharged by certificate of conformity under the Bankrupt Law Consolidation Act, 1849, is void, being a contract within the meaning of s. 204 of that act, *Kidson v. Turner*, 3 H. & N. 581. [So is a policy on an illegal voyage, *Cunard v. Hyde*, 29 L. J. Q. B. 67. As to deeds framed to avoid the mortmain acts, see *Jeffries v. Alexander*, Dom. Proc. 31 L. J. Cha. 9. As to maintenance and champerty, see *Anderson v. Ratcliffe*, E. B. & E. 806; *Sprye v. Porter*, 7 E. & B. 58; *Knight v. Bowyer*, 27 L. J. Cha. 521; *Bainbridge v. Moss*, 3 Jur. N. S. 58.]

It is laid down in some of the older cases, that where there are several conditions to a bond, and any one of them is void by statute, the whole bond is void, *Norton v. Syms*, Moore, 856; S. C. Hobart, 14; *Lee v. Colshill*, Cro. Eliz. 599; *Layng v. Paine*, Willes, 571; [see also *Payne v. Mayor of Brecon*, 3 H. & N. 572.] In *Norton v. Syms*, a distinction is taken in this respect

between covenants or conditions void by common law, and those that are void by statute. It is said that when some covenants in an indenture are void by *common law*, and the others good, a bond for the performance of all the covenants may be good, so far as respects the covenants that are good. But otherwise, if any of the covenants be void by statute, there the bond is void *in toto*. See also 1 Mod. 35, 36; *per* Buller, J., 2 T. R. 139; the expressions of the Lord Chief Justice in the text; *Newman v. Newman*, 4 M. & S. 68; and 5 Taunt. 746. However, the expressions used in the books, which lay down that if one of the conditions of a bond be void by statute, the whole bond is void, must be understood to apply only to cases where the statute enacts that all instruments containing any matter contrary thereto shall be void, for otherwise the common law rule will apply, and that part only will be void which contravenes the provisions of the statute, *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttlesworth*, 13 East, 87; *How v. Synge*, 15 East, 440; provided the good part be separable from, and not dependent on, the illegal part, *Biddell v. Leader*, 1 B. & C. 327; *Kerrison v. Cole*, 8 East, 232; *Wood v. Benson*, 2 Tyrwh. 97. It is indeed clear that if a contract be made on several considerations, one of which is illegal, the whole promise will be void, *Featherstone v.*

Hutchinson, Cro. Eliz. 199; *Waite v. Jones*, 1 Bing. N. C. 662; *Shackell v. Rosier*, 2 Bing. N. C. 646; and *Howden v. Haigh*, 11 A. & E. 1036; and that whether the illegality be at common law, or introduced by statute. *Per* Tindal, C. J., in *Shackell v. Rosier*. The difference is, that every part of the contract is induced and affected by the illegal consideration; whereas in cases where the consideration is tainted by no illegality, but some of the conditions (if it be a bond), or promises (if it be a contract of any other description), are illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another. See *Mallan v. May*, 11 M. & W. 653; *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 15 M. & W. 346: [and *Bourke v. Blake*, 7 Irish C. L. Rep. 348.]

It may be here observed, that though the *illegality* of one of the considerations vitiates the contract, yet it is otherwise if one or more of them be merely void and nugatory, as, for instance, a promise by a man to pay his own just debts; for then the void consideration is a nullity, and the others which remain support the contract. See *Jones v. Waite*, 5 Bing. N. C. 341, and the authorities cited there by Ellis *arguendo*.

In order that a bond or other

contract may be void for disobedience to a statute, it is not necessary that the statute should contain words of positive prohibition. "The principle," said Tindal, C. J., in *De Begnis v. Armistead*, 10 Bing. 110, "is very clearly expressed by Holt, C. J., in *Bartlett v. Vinor*, Carth. 252. 'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'" *Accord. Ferguson v. Norman*, 5 Bing. N. C. 80; *Cundell v. Dawson*, 4 C. B. 376; [*Abbott v. Rogers*, 16 C. B. 277; *Dallax v. Jones*, 26 L. J. Exch. 79;] see too *Gas Light Co. v. Turner*, 6 Bing. N. C. 324, 5 *Id.* 666, where it was held that the covenants in a lease, expressed to be granted for a purpose forbidden by statute, could not be enforced, (and it was there made a question, whether the landlord could ever recover the land, which, however, it should seem he might, see *Treegoning v. Attenborough*, 7 Bing. 97; *Feret v. Hill*, 15 C. B. 207; but see *Scarfe v. Morgan*, 4 M. & W. 270). In *Cope v. Rowlands*, 2 M. & W. 157, [and *Taylor v. Crowland Gas, &c., Co.*, 10 Exch. 293,] the court negatived an idea that had existed, *viz.*, that there was a difference between the stringency of a statute

for the protection of the subject and one for the protection of the revenue.

Nice questions of construction, however, sometimes arise in determining whether the intention of a statute prescribing under penalties the mode of carrying on a particular trade according to certain rules for the protection of the revenue is merely to protect and increase the revenue by enforcing the penalties against a trader who does not comply with the rules, or to render the contracts entered into by such trader illegal. See *Johnson v. Hudson*, 11 East, 180. In *Smith v. Marwood*, 14 M. & W. 452, it was laid down in conformity with the cases above cited, that where the intent of a statute is to prohibit a contract, although that be only by the imposition of a penalty and for purposes of revenue, the contract is void and cannot be enforced by action; but upon the construction of the statute then under consideration, the Excise License Act 6 Geo. 4, c. 81, it was holden that the sections 25 and 26, which enforce penalties upon any manufacturer, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises, or shall not have obtained a license, had not the effect of avoiding a sale made by one who had not conformed to their provisions, or of defeating an action for the price.

[The imposition (by the 57 Geo.

3, c. 60, s. 3) of a penalty on persons acting as brokers in London without license, disables such persons from recovering commission on contracts negotiated by them in defiance of the act, but does not affect their right to recover from their principals money paid at the request of the latter in fulfilment of the contracts. *Smith v. Lindo*, 4 C. B. N. S. 395, S. C. affirmed in error, 5 C. B. N. S. 587.]

A contract will not become illegal by *relation* which was not so when made, although the party making it was bound by law under a penalty to do a subsequent act, which has however been neglected; thus where an attorney neglected to enter his certificate he was permitted to recover for work done before the expiration of the time allowed for entering it, *Eyre v. Shelley*, 6 M. & W. 270. And there may occur cases in which a contract, the performance of which could not have been enforced because the contract itself was forbidden, will become available if executed, because the policy of the statute which prohibits its enforcement while in an executory state was to secure its execution, *McCallan v. Mortimer*, 9 M. & W. 640, where the seller of stock recovered the price of stock actually transferred, although at the time of the contract to transfer the seller was not actually possessed of or entitled to the stock, and so the contract, while executory, as

it is said, was incapable of being enforced by reason of the provisions of the Stock Jobbing Act, 7 Geo. 2, c. 8, s. 8 [repealed by 23 Vict. c. 28. Money received by an agent to be applied to an illegal purpose may be recovered from him by his principal, before it has been so applied, *Atkinson v. Denby*, 6 H. & N. 778; 30 L. J. Exch. 361; affirmed in error Exch. 7 H. & N. 934; 31 L. J. 362.]

It seems, that a contract is not illegal or void, simply because private rights are interfered with by the act stipulated for; *e. g.*, where the consideration is a breach of contract or of private trust, the contract may be enforced, and the persons injured by its performance are left to the ordinary means of redress; *Walker v. Richardson*, 10 M. & W. 284; *per Parke, B.*, *Jackson v. Cobbin*, 8 M. & W. 797; *per Vaughan, C. J.*, *Rudyard's Case*, 2 Vent. 23.

In a modern case of great importance, the question arose whether illegality vitiated the contract in which it existed only, or whether its effect was such as also to vitiate any subsequent contract to do an act just in itself and not objectionable otherwise than for being part of the terms of the original contract, though such subsequent contract were under seal, and for a good consideration, and the illegality wholly past and gone? That was the case of *Fisher v. Bridges*, 2 E. & B. 118,

in the Queen's Bench ; 3 E. & B. 642, in the Exchequer Chamber. There to an action upon a covenant for payment of money, the defendant pleaded an agreement for a sale of land by the plaintiff to him, defendant, for a sum of money, " to the intent, and in order, and for the purpose, as the plaintiff at the time of the agreement for sale well knew, that the land should be sold by lottery, contrary to the statute," that afterwards, in pursuance of this illegal agreement, the lands were assigned, and that the defendant made the deed to secure payment to the plaintiff of part of the purchase-money which remained unpaid. The Court of Queen's Bench held this to be a bad plea, upon the ground that it did not show that the deed of covenant was stipulated for in, or given under, or in contemplation, or furtherance of the illegal contract ; and to use the language of Erle, J., " that whatever is entirely posterior to the illegal act may be supported as not being tainted with the illegality," and they likened this case to that of a bond to provide an allowance for a woman with whom the obligor had cohabited. The Court of Exchequer Chamber, however, were of a contrary opinion, saying, that " It is clear that the covenant was given for payment of the purchase-money. It springs from, and is a creature of the illegal agreement, and as the law would not enforce

the original illegal contract, so neither will it allow the parties to enforce a security for the purchase-money, which, by the original bargain, was tainted with illegality." The court then proceeded to deal with the cases respecting provisions in consideration of past cohabitation, as follows :—" The case of *Beaumont v. Reeve*, [8 Q. B. 483], much relied upon in the court below, does not in our judgment affect the question. It is clear that past cohabitation and previous seduction are not good considerations for a parol promise ; but they are not therefore illegal considerations. They are no considerations at all : and, inasmuch as a bond, or other instrument under seal, is good without any consideration, it by no means follows that a covenant to pay a sum of money tainted with illegality, can be enforced merely because a bond for maintenance, founded upon past cohabitation or previous seduction, is good. If an agreement had been made to pay a sum of money in consideration of future cohabitation, and, after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this ; and such a bond could not under such circumstances be enforced."

This case belongs to a class which it has been the tendency of some modern decisions to enlarge, of solemn contracts not in themselves transgressing any positive

rule of law, yet held to be void by reason of some constructive illegality, or supposed tendency to contravene public policy. The expression upon which the judgment of the Court of Exchequer Chamber turns, that the contract was void because it was "to pay a *sum of money tainted with illegality*," is surely vague in itself and dangerous as a precedent. What may have been the true construction of the plea in *Fisher v. Bridges*, is a matter of small importance; but it may be hoped that it is not too late, by the aid of the highest tribunal, to restore the rule of law laid down in the Court of Queen's Bench. [*Fisher v. Bridges* was acted on in *Geere v. Mare*, 2 H. & C. 339; 33 L. J. Exch. 50. In *The A.-G. v. Hollingsworth*, 2 H. & N. 416; and *Flight v. Reed*, 1 H. & C. 703; 32 L. J. Exch. 265, the connexion of the instruments with the prior illegal transaction, was held not to be such as to vitiate them. The execution of a deed which is merely rendered void by a statute may be a sufficient consideration for a promise, as in *Westlake v. Adams*, 5 C. B. N. S. 248, where the giving of an indenture of apprenticeship which was void by reason of 8 Anne, c. 9, s. 39, because only part of the amount of the premium was stated in the instrument, was held to be a sufficient consideration for a promise by the father of the intended apprentice to pay the master the rest of the

premium, although service under such an indenture would not create the relation of master and apprentice, even as against a wrongdoer enticing the latter away from the service. *Cox v. Muncey*, 6 C. B. N. S. 375.]

Reference may here be made to the modern case of *Hawkes v. Eastern Counties Rail. Co.* [5 H. of Lords Cases, 331], where the cases relating to what has been called the *ultra vires* doctrine respecting contracts entered into by corporations, were discussed, and much qualified. Also to the case of *Hilton v. Eckersley*, [6 E. & B. 47; affirmed in error, Ib. 66.] in which the doctrine was again avowed by high authority, that a contract might be void as contrary to public policy, although not violating any rule of law, and the existence of such a doctrine was lamented. The law upon this subject is, it must be confessed, in an unsatisfactory state, and there seems but too much ground to fear that unless checked by a firm determination to uphold men's acts, when not in violation of some known rule of law, and to treat decided cases having a contrary tendency as exceptional, it may degenerate into the mere private discretion of the majority of the court as to a subject of all others most open to difference of opinion, and most liable to be affected by changing circumstances.

[A corporation is bound by a

deed under its seal duly affixed, unless illegality or fraud can be established. *The Royal British Bank v. Turquand*, 5 E. & B. 248, affirmed in error, 6 E. & B. 327; *Shrewsbury and Birmingham Rail. Co. v. N. W. Rail. Co.*, 6 H. of Lords Cases, 113; *Agar v. The Athenceum Life Assurance Society*, 3 C. B. N. S. 725; *Prince of Wales Assurance Co. v. Harding*, E. B. & E. 183; *Bateman v. The Mayor, &c., of Ashton-under-Lyne*, 3 H. & N. 572; *Simpson v. Westminster Palace Hotel Co.*, 8 H. of L. Cases, 712; 6 Jur. N. S. 985; and the defence resting on the *ultra vires* doctrine exists only when the corporation is prohibited by law from entering into the contract upon which the action is brought. "Corporations," said Baron Parke, in an often-quoted passage, "which are creatures of law, are, when their seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an act of parliament for particular purposes, with special powers, then indeed another question arises: their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by reasonable inference from its enactments that the deed was

ultra vires—that is, that the legislature meant that such a deed should not be made. The question," continued the learned judge, referring to the case then before him, "appears to me to be simply this, whether it can reasonably be made out from the statute that this covenant is *ultra vires*, or, in other words, forbidden to be entered into by either the plaintiffs or the defendants;" see *The South Yorkshire Rail. &c. Co. v. The Great Northern Rail. Co.*, 9 Exch. 84, 85; and the judgments of Lord Campbell, C. J., and of Erle, J., in *The Mayor of Norwich v. The Norfolk Rail. Co.*, 4 E. & B. 413, 447; and of the court in *The South Wales Rail. Co. v. Redmond*, 10 C. B. N. S. 675. Accordingly, in *Payne v. The Mayor of Brecon*, 3 H. & N. 572, a municipal corporation was held to be liable upon its covenant to repay money borrowed on a mortgage of its land, although, by the 94th section of the Municipal Corporation Act, it is provided that it shall not be lawful for corporations of this description to mortgage any of their lands without the consent of the lords of the treasury, and no such consent had, in fact, been obtained. See also *Buteman v. The Mayor, &c., of Ashton-under-Lyne*, 3 H. & N. 323, where a waterworks company was held liable (Bramwell, B., dissentiente) on their contract to pay for certain work which they required for the purpose of making an application

to parliament for an extension of their powers, and the ground of this decision was that the company did not appear to be prohibited from entering into such a contract; and *Dorrett v. Harding*, 1 C. B. N. S. 524. A prohibition to enter into the contract may be implied; for instance, such an implication may be made where the contract appears to be necessarily unconnected with the purpose of the company's incorporation (see the judgment of Erle, J., in *The Mayor of Norwich v. The Norfolk Rail Co.*, *supra*); as where for instance, a railway company, invested with no larger statutory powers than those usually given to such companies, carries on the business of coal-merchants. *Attorney-General v. The Great Northern Rail. Co.*, 1 Drew. & Sm. 154.

There is another class of cases relating to corporations established under acts of parliament, and more particularly to registered joint-stock companies, in which the contract sued upon has been such as the corporation could lawfully enter into; but the question has been whether the fulfilment of some provision or regulation prescribed by the statute or deed of settlement constituting the corporation, should be considered a condition precedent to the validity of the contract. In *Frend v. Dennett*, 4 C. B. N. S. 576, a statutory requirement, by which local boards of health are empowered to con-

tract so as to bind the rates of their districts, provided their contracts are under seal, was held to be a condition essential to the validity of their contracts. In *Ernest v. Nicholls*, 6 H. of Lords Cases, 401, a deed which purported to be an assignment by one joint-stock company to another of its business, the latter covenanting to indemnify the former against its existing liabilities, was held to be invalidated under s. 29 of the 7 & 8 Vict. c. 110, by the fact that one of the directors who executed it was interested in the contract. See *In re South Essex Gas, &c., Co.*, 1 Johns. 480. The following cases, namely, *The Prince of Wales &c. Assurance Co. v. Harding*, E. B. & E. 183, where the deed of settlement required that the seal should not be affixed except by previous order of three directors, signed by them, *Agar v. The Athenæum Life Assurance Society*, 3 C. B. N. S. 725, where, by the deed of settlement, a resolution at a general meeting of the company was required, in order to authorise the directors to borrow money, and *Nowell v. The Mayor of Worcester*, 9 Exch. 457, are decisions in which the violation of provisions not known to the parties contracting with the companies were held to afford no answer to actions against the companies on their contracts, although the infringement of these regulations might amount to breaches of trust as between

the shareholders and the directors of the companies. See also *Bill v. The Darenth Valley Rail. Co.*, 1 H. & N. 305. But persons dealing with incorporated companies are ordinarily bound to take notice of the terms both of the statutes constituting the companies and of their deeds of settlement, *Balfour v. Ernest*, 5 C. B. N. S. 601; *In re Athenæum Society*, 4 K. & J. 549; and the execution by directors on behalf of a company of an instrument which, upon the face of the deed of settlement, the directors *could not* have had authority to execute, will not bind the company. See *In re Era Assurance Society*, 2 Johns. & H. 400; 30 L. J. Cha. 137; *In re The State Fire Insurance Co.*, 33 L. J. Cha. 123. "We may now take it for granted," said Jervis, C. J., in *The Royal British Bank v. Turquand*, 6 E. & B. 327, "that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement, *but they are not bound to do more*. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document,

appeared to be legitimately done. See also the judgment of Wood, V. C., in *re Athenæum Society*, 4 K. & J. 560, 561; *The Prince of Wales Assurance Co. v. Harding*, *ubi supra*; *Agar v. The Athenæum Life Assurance Society*, 3 C. B. N. S. 725. As to when contracts may be avoided by a company, on the ground of fraud or illegality, the party seeking to enforce the contract having known that in fact the directors had exceeded their authority to the prejudice of their shareholders, see the judgment of Lord Campbell, C. J., in *The Royal British Bank v. Turquand*, 5 E. & B. 261; *The Prince of Wales Assurance Co. v. Harding*, *supra*; *The Athenæum Life Assurance Co. v. Pooley*, 3 De G. & J. 294; 28 L. J. Cha. 119; *Haddon v. Ayers*, 28 L. J. Q. B. 105; and *In re The Saxon Life Assurance Co.*, 30 L. J. Cha. 207.]

A question sometimes arises, whether, when a statute points out a particular mode for the performance of some act therein commanded, its enactments shall be taken to be *imperative*, or only *directory*; in the former only of which cases an act done in a different mode from that pointed out by the statute would be void. In *Pearce v. Morrice*, 2 A. & E. 96, the following rule for distinguishing between imperative and merely directory enactments, is given by Mr. Justice Taunton, "A clause is *directory* where the

provisions contain mere matter of direction, and no more; but not so when they are followed by words of positive prohibition." See *Rex v. Gravesend*, 3 B. & Ad. 240; *Rex v. St. Gregory*, 2 A. & E. 106; *Brooks v. Cock*, 3 A. & E. 138; *Southampton Dock Company v. Richards*, 1 M. & Gr. 448; 1 Scott, N. R. S. C. 219; *R. v. Birmingham*, 6 B. & C. 29; *Thompson v. Harvey*, 4 H. & N. 254; *Wolverhampton New Waterworks Co. v. Hawksford*, 7 C. B. N. S. 795, where an act was required to be done within a certain time; *Cole v. Green*, 7 Scott, N. R., 682; [6 M. & Gr. 872, S. C.] where a particular mode of signature of a contract was directed. "It is" (said Parke, B., in *Gwynne v. Burnell*, 2 Bing. N. C. 39) "by no means any impediment to construing a clause to be *directory*, that if it is so construed there is no remedy for non-compliance with the direction. Thus, the statutes which direct the quarter sessions to be held at certain times in the year, are construed to be *directory*, *Rex v. Justices of Leicester*, 7 B. & C. 6. And the sessions held at other times are not void. Yet it would be difficult to say that there would be any remedy against the justices for appointing them on other than the times prescribed by the statute," *Thames Haven Dock Company v. Rose*, 4 M. & G. 552; 5 Scott, N. R. 524, S. C.

In *Gillow v. Lillie*, 1 Bing. N. C.

696, the question was discussed, whether a joint deed executed by two persons, one of whom laboured under a statutory disability, would be void as against both, or only as against the one rendered incapable by statute; but the point was not decided, as the court held that, the deed being several as well as joint, the defendant's several liability was sufficient to maintain the action.

It is laid down in *Whelpdale's Case*, 5th Rep. 119, a; *Stead v. Moon*, Cro. Jac. 152; and ever since held, that illegality must be *pleaded* in answer to a bond or other deed, and cannot be taken advantage of under a plea of *non est factum*. See *Mestayer v. Biggs*, 4 Tyrwh. 471; 1 C. M. & R. 110; where it was held that non-compliance with the provisions of the Annuity Act must be pleaded; and so must fraud. [See Reg. Gen. (Pleading) Hil. T., 1853, 8;] *Edwards v. Stephen*, 1 Tyrwh. 209. In *Hill v. Manchester and Salford Waterworks Company*, 5 B. & Ad. 874, a corporation was empowered by statute to raise money by bonds under their common seal, and the act directed that the issue of all such bonds should be sanctioned by the resolution of a meeting of proprietors, constituted in a particular way. Certain bonds were issued by the agent, and sealed with the seal of the corporation, [in fact] not in pursuance of the resolution of any such meeting as the statute directed; [but this

fact could only be established by the books of the corporation kept by its clerk.] The court [held that these books were not evidence, but expressed an opinion] that the non-compliance with the provisions of the statute, [if it could have been proved,] might [have been] given in evidence under *non est factum*. The ground [of this opinion was] that as the corporation was the creature of the act, and had no powers but those which the act gave it, a bond not executed in conformity to the act [would not have been] in point of fact executed by the corporation at all. See *Pontet v. Basingstoke Canal Co.*, 3 Bing. N. C. 433. The illegality too must be clearly shown, for it is a thing not to be presumed upon a dubious state of pleading, *Jones v. Waite*, 5 Bing. N. C. 350; 9 Cl. & Fin. 88, S. C.; [*Day v. Hemming*, Q. B. 4th June, 1861.]

With respect to *fraud*, that has been always considered pleadable as well as illegality, and it is pleadable only and cannot be given in evidence under *non est factum*, *Edwards v. Brown*, 1 C. &

J. 307; [Reg. Gen. (Pleading) Hil. T. 1853, 8. But fraud may be pleaded generally. See *Hill v. Montague*, 2 M. & S. 377; *Lawton v. Elmore*, 27 L. J. Exch. 141.] In a case at N. P., Lord Abinger held that where the party knows the effect of what he executes, proof that it was executed in consequence of previous fraud is not evidence under a plea of fraud, *Mason v. Ditchbourne*, 1 M. & Rob. 460. A new trial was moved for, and the Court of Exchequer made the rule absolute, in order that the question might be more distinctly raised, *ibid. in notis*, 2 C. M. & R. 720, n. [The ruling at N. P. seems inconsistent with the judgment of the House of Lords in the case of *Smith v. Kay*, 7 H. of Lords Cases, 750.]

Where it is sought to invalidate a deed on the ground of fraud, evidence of a consideration different from that expressed may be given for the purpose of supporting the deed, *Gale v. Williamson*, 8 M. & W. 405; *Pott v. Todhunter*, 2 Col. C. C. 76; [and see *Harris v. Rickett*, 4 H. & N. 1.]

MITCHEL v. REYNOLDS.

HIL. 1711.—B. R.

[REPORTED 1 P. WILLIAMS, 181.]

A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. Secus, if it be on no reasonable consideration, or to restrain a man from trading at all.

10 Mod. 27,
85, 130.
Fort. 296.
Resolution of
the court of B.
R.

DEBT upon a bond. The defendant prayed *oyer* of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in *Liquorpond Street*, in the parish of *St. Andrew's, Holborn*, for the term of five years : now if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. *Quibus lectis et auditis*, he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quod* he did trade, *prout ei bene licuit*. Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, *Parker*, C. J., delivered the resolution of the Court.

The general question upon this record is, whether this bond, being made in restraint of trade, be good ?

And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good ; and

that the true distinction of this case is, not between promises and bonds, but between contracts *with* and *without* consideration ; and that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained ; but with this constant diversity, *viz.*, where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place ; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavour to state the law upon this head, and to reconcile the jarring opinions ; in order whereunto I shall proceed in the following method :—

1st. Give a general view of the cases relating to the restraint of trade.

2ndly. Make some observations from them.

3rdly. Show the reasons of the differences which are to be found in these cases ; and

4thly. Apply the whole to the case at bar.

As to the cases, they are either first, of involuntary restraints against, or without a man's own consent : or secondly, of voluntary restraints by agreement of the parties.

Involuntary restraints may be reduced under these heads :—

1st. Grants or charters from the crown.

2ndly. Customs.

3rdly. By-laws.

Grants or charters from the crown may be,

1st. A new charter of incorporation to trade generally, exclusive of all others, and this is void. 8 Co. 121.

2ndly. A grant to particular persons for the sole exercise of any known trade ; and this is void, because it is a monopoly, and against the policy of the common law, and contrary to *Magna Charta*. 11 Co. 84.

3rdly. A grant of the sole use of a new invented art,

and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1. cap. 3. s. 6. to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.*

* See the further regulations introduced by st. 5 & 6 W. 4, c. 83; 2 & 3 V. c. 57; 7 & 8 V. c. 69.

Restraints by custom are of three sorts:—

1st. Such as are for the benefit of some particular persons, who are alleged to use a trade for the advantage of a community, which are good. 8 Co. 125. Cro. Eliz. 803. 1 Leon. 142. Mich. 22 H. 6. 614. 2 Bulst. 195. 1 Roll. Abr. 561.

2ndly. For the benefit of a community of persons who are not alleged, but supposed to use the trade, in order to exclude foreigners.† Dyer 279. b. W. Jones 162. 8 Co. 121. 11 Co. 52. Carter 68. 114, held good.

3rdly. A custom may be good to restrain a trade in a particular place, though none are either supposed or alleged to use it; as in the case of *Rippon*. Register 105, 106.

Restraints of trade by by-laws are these several ways:—

1st. To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty. Carter 68. 114. 8 Co. 125 (a). But where there is no precedent custom, such by-law is void. 1 Roll. Abr. 364. Hob. 210. 1 Bulst. 11. 3 Keb. 808 (b). But the case in Keble is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2ndly. All by-laws made to cramp trade in general, are void. Moor 576. 2 Inst. 47. 1 Bulst. 11.

3rdly. By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases (c), viz. if they are for the benefit of the place, and to avoid public inconveniences, nuisances, &c. Or for the advantage of the trade, and improvement of the commodity. Sid. 284. Raym. 288. 2 Keb. 27. 873. and 5 Co. 62. b., which last is upon the by-law for bringing all broad-cloth to *Blackwell Hall*, there to be viewed and marked, and to pay a penny *per* piece for marking: this was

† Restraints of this kind, whether by custom or by law, are now abolished in all boroughs by st. 5 & 6 W. 4, c. 76, s. 14. This act does not affect London.

(a) *Wolley v. Idle*, 4 Burr. 1951.

(b) Vide *Harrison v. Godman*, 1 Burr. 12. *Hesketh v. Braddock*, 3 Burr. 1856.

(c) *Wannell v. Chamber of the City of London*, 1 Stra. 675. *The King v. Harrison*, 3 Burr. 1322. *Pierce v. Bartrum*, Cowp. 269.

held a reasonable by-law ; and indeed it seems to be only a fixing of the market ; for one end of all markets is, that the commodity may be viewed ; but then they must not make people pay unreasonably for the liberty of trading there.

In 2 Keb. 309. the case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties are either,

1st. General, or

2ndly. Particular, as to places or persons.

General restraints are all void, whether by bond, covenant or promise, &c., with or without consideration, and whether it be of the party's own trade, or not. Cro. Jac. 596. 2 Bulst. 136. Allen 67.

Particular restraints are either, 1st, without consideration, all which are void by what sort of contract soever created. 2 H. 5. 5. Moor 115. 242. 2 Leon. 210. Cro. Eliz. 872. Noy 98. Owen 143. 2 Keb. 377. March 191. Show. 2. (not well reported.) 2 Saund. 155.

Or 2ndly, particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136. *Rogers v. Parry*. Though that case is wrongly reported, as appears by the roll which I have caused to be searched, it is B. R. Trin. 11 Jac. 1 Rot. 223. And the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though as they stand in the book, they do not seem material. Noy 98. W. Jones. 13 Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general and restraints particular, and with or without consideration, which stands upon very good foundation ; *Volenti*

non fit injuria: a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

Palm. 171. *Bragg v. Stanner*. The entering upon the trade, and not whether the right of action accrued by bond, promise or covenant, was the consideration in that case.

Vide March's Rep. 77, but more particularly Allen's 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly, I come now to make some observations that may be useful in the understanding of these cases. And they are,

1st. That to obtain the sole exercise of any known trade throughout *England*, is a complete monopoly, and against the policy of the law.

2ndly. That when restrained to particular places or persons, (if lawfully and fairly obtained,) the same is not a monopoly.

3rdly. That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

4thly. That it is lawful upon good consideration for a man to part with his trade.

5thly. That since actions upon the case are actions *injuriarum*, it has been always held, that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it *injuriously*.

6thly. That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7thly. That no man can contract not to use his trade at all.

8thly. That a particular restraint is not good without just reason and consideration.

Thirdly, I propose to give the reasons of the differences which we find in the cases; and this I will do,

1st. With respect to involuntary restraints, and

2ndly. With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these, as are created by grants and charters from the crown and by-laws, generally, are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of the subject.

2ndly. Another reason is drawn from *Magna Charta*, which is infringed by these acts of power; that statute says, *nullus liber homo, &c., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, &c.*, and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, nobody can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

I shall show the reason of the differences in the cases of voluntary restraint.

1st. Negatively.

2ndly. Affirmatively.

I. *Negatively*; the true reason of the disallowance of these in any case, is never drawn from *Magna Charta*; for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

2ndly. Neither is it a reason against them that they are contrary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty: as in the case of a covenant not to erect a mill upon his own lands. J. Jones, 13 Mich. 4, Ed. 3, 57. And when any of these are at any time mentioned as

reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favour and indulgence of the law to trade and industry.

3rdly. It is not a reason against them, that they are against law, I mean in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense, are reducible under one of these heads.

1st. Either to do something that is *malum in se*, or *malum prohibitum*. 1 Inst. 206.

2ndly. To omit the doing of something that is a duty. Palm. 172. Hob. 12. *Norton v. Sims*.

3rdly. To encourage such crimes and omissions. Fitzherb. tit. *Obligation*, 13. Bro. tit. *Obligation*, 34. Dyer 118.

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer,

1st. That where there may be a way found out to perform the condition, without a breach of the law, it shall be good. Hob. 12. Cro. Car. 22. Perk. 228.

* [Lege "not prohibited."]

2ndly. That all things prohibited* by law may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a proper sense, as being neither *mala in se*, nor *mala prohibita*, and the law allowing them in some instances, as in those of customs and *assumpsits*, they may be restrained by condition.

II. *Affirmatively*; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2ndly, to the public, by depriving it of a useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations

who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them lest they should prejudice them in their custom, when they come to set up for themselves.

3rdly. Because, in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout *England*; for what does it signify to a tradesman in *London*, what another does at *Newcastle*? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The *Roman* law would not enforce such contracts by an action. See Puff., lib. 5. c. 2, sect. 3. 21 H. 7. 20.

4thly. The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade: or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

5thly. The law is not so unreasonable as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another: as it must do, if contracts with a consideration were made void. *Barrow v. Wood*, March Rep. 77. Mich. 7 Ed. 3. 65. Allen 67. 8 Co. 121.

But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

Resp. I do not see why that should not be shown by pleading; though certainly the law might be settled either way without prejudice; but as it now stands, the rule is, that wherever such contract *stat indifferenter*, and, for

aught appears, may be either good or bad, the law presumes it *primâ facie* to be bad, and that for these reasons :

1st. In favour of trade and honest industry.

2ndly. For that there plainly appears a mischief, but the benefit (if any) can be only presumed ; and in that case, the presumptive benefit shall be overborne by the apparent mischief.

3rdly. For that the mischief (as I have shown before) is not only private, but public.

4thly. There is a sort of presumption, that it is not of any benefit to the obligee himself, because it being a general mischief to the public, everybody is affected thereby : for it is to be observed, that though it be not shown to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason, *viz.*, as taking away the obligor's livelihood, which proves that the law presumes it ; and this presumption answers all the difficulties that are to be found in the books.

As, 1st, That all contracts, where there is a bare restraint of trade and no more, must be void ; but this taking place only where the consideration is not shown, can be no reason why, in cases where the special matter appears, so as to make it a reasonable and useful contract, it should not be good ; for there the presumption is excluded, and therefore the courts of justice will enforce these latter contracts, but not the former.

2ndly. It answers the objection, that a bond does not want a consideration, but is a perfect contract without it ; for the law allows no action on a *nudum pactum*, but every contract must have a consideration, either expressed, as in *assumpsits*, or implied, as in *bonds* and *covenants*, but these latter, though they are perfect as to the form, yet may be void as to the matter : as in a covenant to stand seised, which is void without a consideration, though it be a complete and perfect deed.

3rdly. It shows why a contract not to trade in any part of England, though with consideration, is void ; for there is something more than a presumption against it,

because it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4thly. This shows why promises in restraint of trade have been held good; for in those contracts, it is always necessary to show the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shown. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of Judge Hull in 2 H. 5, fol. quinto; for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare that he would not follow it any more, &c., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work at it again, and afterwards when the necessities of his family and the cries of his children send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think. this such a piece of villany, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner of expressing it. Surely it is not fitting that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good, but when it is reduced into the form of a bond, it immediately becomes void; but for what reason see 3 Lev. 241. Now, a bond may be considered two ways, either as a security, or as a compensation; and,

1st. Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise, to be.

2ndly. Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contracting, may not settle the *quantum* of damages for such an injury? Bract., lib. 3, c. 2, s. 4.

(a) *Grantham*
v. *Gordon*, 1 P.
Williams, 614.

It would be very strange, that the law of England, that (a) delights so much in certainty, should make a contract void when reduced to certainty, which was good when loose and uncertain: the cases in *March's Rep.* 77, 101, and also *Show*, 2, are but indifferently reported, and not warranted by the authorities they build upon.

1st *Objection*. In a bond the whole penalty is to be recovered, but in *assumpsit* only the damages.

Resp. This objection holds equally against all bonds whatsoever.

2nd *Objection*. Another objection was, that this is like the case of an infant, who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees.

Resp. The case of an infant stands on another reason, *viz.*, a general disability to make a deed, but here both parties are capable; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable; but it is otherwise here.

Also the case of a sheriff is very different; for at common law he could take nothing for doing his duty but the statute has given him certain fees: but he can neither take more, nor a chance for more, than that allows him.

3rd *Object*. It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case?

Resp. 1st. It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is matter of law, not fit for a jury to determine.

2ndly. It is to ascertain the damages; but *cui bono* (say they) should that be done? Is it for the benefit of the obligor?

Resp. Certainly it may be necessary on that account, for these reasons:—

1st. A bond is a more favourable contract for him than a promise; for the penalty is a repurchase of his trade ascertained beforehand (*a*), and on payment thereof he shall have it again; he may rather choose to be bound not to do it under a penalty, than not to do it at all.

2ndly. However it be, it is his own act.

3rdly. He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

4thly. Restraints by custom may (as I have proved) be enforced with penalties which are imposed without the party's consent; nay, by the injured party without the concurrence of the other; and if so, then *à fortiori* he may bind himself by a penalty.

Object. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labours to prevent.

Resp. But this is no more to be presumed than false testimony, and in such a case I should think the defendant might aver against it; for though the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void it is otherwise, as in the case of a usurious contract.*

The application of this to the case at bar is very plain. Here the particular circumstances and consideration are set forth, upon which the court is to judge, whether it be a reasonable and useful contract.

The plaintiff took a baker's house, and the question is whether he or the defendant shall have the trade of this neighbourhood? The concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, *viz.*, the term of five years.

To conclude. In all restraints of trade, where nothing

(*a*) See *vide* *Hardy v. Martin*, 1 Bro. Cha. Rep. 419, note. [See *Howard v. Woodward*, 34 L. J. Cha. 47; *Barrett v. Blagrove*, 5 Ves. 555; *Fletcher v. Dyche*, 2 T. R. 32, per Buller, J.; *Saintier v. Ferguson*, 1 Mac. & G. 286; *Barton v. Glover*, Holt, 43; *Carnes v. Nisbett*, 7 H. & N. 158; 30 L. J. Exch. 348; *Same v. Same*, 7 H. & N. 778; 31 L. J. Exch. 278, S. C.; *Thorn-ton v. Kendall*, Wood, V.-C., 10 February, 1863; *Clark v. Watkins*, Stuart, V.-C., 15 January, 1863.]

* *Accord. Collins v. Blanton*, ante. p. 325, et note.

more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

For these reasons we are of opinion, that the plaintiff ought to have judgment.

“THE general rule is, that all restraints of trade, which the law so much favours, if nothing more appear, are bad. This is the rule which is laid down in the famous case of *Mitchel v. Reynolds*, which is well reported in 1 P. Wms. 181, in which Lord Macclesfield took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered: but to this general rule there are some exceptions; as, *first*, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the party restrained. A contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law, notwithstanding the general rule, and this was the very case of *Mitchel v. Reynolds*.” *Per* Willes, C. J., in the *Master, &c., of Gun-makers v. Fell*, Willes, 388. See *Stuart v. Nicholson*, 3 Bing. N. C. 113. The same principles are recognised in the judgment of the court in *Gale v. Reed*, 8 East, 83, in a variety of cases, both previous and subsequent, particularly in *Chesman v. Nainby*, 2 Str. 739; 3 Bro. P. C. 349; which received the successive decisions of the King’s Bench, Common Pleas, and House of Lords. The reader will find all the authorities collected in *Young v. Timmins*, 1 Tyrwh. 226; 1 C. & J. 331; and the rule to be collected from them all is stated in that case by Vaughan, B., p. 241, *viz.*, “any agreement by bond or otherwise in *general restraint* of trade, is illegal and void. But such a security given to effect a *partial restraint* of trade may be good or bad, according as the consideration is adequate or inadequate.” In order, therefore, that a contract in restraint of trade may be valid *at law* (for even then equity is loth to enforce it specifically, if the terms be at all hard, or even complex, *Kimberley v. Jennings*, 1 Sim. 340, though in [many] cases it will do so, *Kemble v. Kean*, 6 Sim. 335; *Whittaker v. Howe*, 3 Beav. 383; [*Avery v. Langford*, Kay 663; *Turner v. Evans*, 2 De G. M. & G. 746; *Benwell v. Inns*,

Beav. 307; 26 L. J. Cha. 663; *low v. Wallingford*, 12 Jur., the restraint must be *first* and; *secondly*, upon an adequate, or, as the rule now seems, not on a mere colourable consideration; and there is a third site, namely, that it should be *reasonable*, the meaning of which shall be presently considered.

First, the restraint must be *partial*.

It was decided so early as the reign of Henry V. that a condition imposing a general restraint is void. Indeed, Hull, J., entered into a passion at the very thought of a bond imposing such a restriction, and exclaimed, with more fervour than decency: "A Frenchman intent vous purres aver de l'argent sur luy que l'obligation est telle que le condition est contre le commun ley, et per lez, si le plaintiff fuit icy, il est en prison tanque il ust fait au Roy." [2 Hen. V. fo. 5, 6.] "The law," said Best, C.J., in *Comer v. Ashford*, 3 Bing. 328, will not permit any one to restrain a person from doing what is in his own interest and the public interest require that he should do.

It is a deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking *in the kingdom*, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade, or to

act in a profession, in a particular place, proper." Such partial restraints were upheld in *Chesman v. Nainby*, in *Clerk v. Comer*, Cas. temp. Hardw. 53, where a bond was conditioned not to carry on trade within the city of Westminster, or bills of mortality; in *Davis v. Mason*, 5 T. R. 118, and in *Bunn v. Guy*, 4 East, 190, where an attorney bound himself not to practise *within London, and 150 miles from thence*. See also remarks on this case in *Bozon v. Farlow*, Meriv. 472. In *Whittaker v. Howe*, 3 Beav. 383, a case which seems to go further than any other, and the correctness of which notwithstanding the elaborate reasoning whereon the judgment proceeded may perhaps be questioned, the agreement was by attorneys and solicitors not to practise in Great Britain for the space of twenty years without the consent of the gentleman to whom they had sold their business, and Lord Langdale, M. R., "having regard to the nature of the profession, to the limitation of time, and to the decision that the distance of 100 miles does not describe an unreasonable boundary," upheld the contract. [For the same reason a covenant by a horse-hair manufacturer, not to carry on trade within 200 miles of Birmingham was held binding, *Harms v. Parsons*, 32 L. J. Cha. 247.] In *Proctor v. Sargent*, 2 M. & G. 31, 2 Scott, N. R. 289, S. C., the contract was that the defendant, who

was about to enter the service of the plaintiff, a cowkeeper and milkman, should not during the service, or within two years after quitting or being discharged therefrom, carry on the business of a cowkeeper, milkman, milkseller, or milk-carrier within five miles of Northampton-square. [And see *Benwell v. Inns*, 24 Beav. 307, where an injunction to restrain the breach of a similar agreement was granted.] In *Rannie v. Irvine*, 8 Scott, N. R., 674, 7 M. & Gr. 969, S. C., it was against soliciting the custom of, or knowingly supplying bread or flour to any of the customers then dealing at a baker's shop, the lease and goodwill of which were sold. In *Leighton v. Wales*, 3 M. & W. 545, the restraint was against running any coach on a particular road. [In *Mumford v. Gething*, 7 C. B. N. S. 305, the restraint was upon a commercial traveller and against his ever travelling for any other firm than the plaintiff's within the district in which they employed him.] In *Gale v. Reed*, 8 East, 79, the restraint was partial in a different way. There the defendant covenanted not to exercise the business of a rope-maker during his life, except on government contracts, and to employ the plaintiffs exclusively to make all the cordage which should be ordered of him by his friends or connexions. The plaintiffs were to allow him two shillings per cwt. on the cordage made on his recommendation

for such of his friends or connexions whose debts should turn out to be good; and were not to be compelled to furnish goods to any whom they should be disinclined to trust. The court held this agreement *good*, considering that they must construe the whole of it together, and that, construing it together, it appeared not to be the intention of the plaintiffs to restrain the defendant from supplying such of his connexions as they themselves did not think fit to trust. In *Ward v. Byrne*, 5 M. & W. 561, a bond conditioned not to follow or be employed in the business of a coal merchant for nine months was held *void*. So was a covenant not to carry on the business of a brewer, or merchant, or agent, for the sale of ale, in S. or elsewhere, or in any other manner soever be concerned in the said business during a term of ten years, in *Hinde v. Gray*, 1 M. & Gr. 195, 1 Scott, N. R. 123, S. C. But perhaps that might now be considered a valid covenant so far as it related to S., though void as to the rest: *Price v. Green*, 16 M. & W. 396. [Where the condition of a bond given by an agent to his employers was that he would faithfully serve them, and not do business in their trade within ten miles of T. for himself, or any other person or firm, the restraint was held to be only "*durante servitio*." *King v. Hansell*, 5 H. & N. 106; *Carnes v. Nisbett*, 31 L. J. Exch. 273. As to the effect

of partiality or universality in respect of *time* in the case of restraints, otherwise bad or good with regard to *space*, see the observations of Parke, B., in *Ward v. Byrne*, 5 M. & W. 548; of Byles, J., in *Mumford v. Gething*, 7 C. B. N. S. 317; *Whittaker v. Howe*, 3 Beav. 383; and *Jones v. Dees*, 1 H. & N. 189.]

Where the restraint is partial in respect of space, the proper way of measuring the distance is to take the nearest mode of access to the point whence it is to be reckoned. *Leigh v. Hind*, 9 B. & C. 774, 4 M. & R. 597, S. C.; *Atkins v. Kinnier*, 4 Exch. 776; [*Quære*, for in *Leigh v. Hind*, Baron Parke thought the measurement should be in a straight line from point to point; and in that case the question was not whether the measurement should be in a straight line, or by the nearest way of access, but whether it should be by the *nearest* or by the *usual* mode of access. In *Atkins v. Kinnier*, the deed expressly prescribed how the measurement should be made, namely, "measuring by the usual streets or ways of approach," which words were held to mean, not by the most frequented public ways, but by any of the usual public ways. These cases, therefore, are not authorities against the view that where the agreement is silent as to the mode of ascertaining the distance, the measurement should be in a straight line; and this

view has been acted upon in the recent case of *Duignan v. Walker*, 1 Johns. 446. For analogous cases, see *R. v. Saffron Walden*, 9 Q. B. 76; *Lake v. Butler*, 5 E. & B. 92; *Jewel v. Stead*, 6 E. & B. 350.]

Upon the second point, namely, the *adequacy of the consideration*, some confusion, rather verbal than substantial, had at one time crept into the judgments, thus it was held in *Young v. Timmins*, 1 Tyrwh. 226, that where Ireland bound himself to work exclusively for certain persons for his and their lives, they not undertaking to find him full employ, but on the contrary, reserving to themselves liberty to employ others, the contract was *void* for want of *adequacy of consideration* though it contained a proviso, under which Ireland was allowed to take and execute the orders of persons residing in London or within six miles thereof. "If I could find," said Bayley, B., "any obligation on the defendants to find the bankrupt a supply of work sufficient to keep him and his workmen in an adequate and regular course of employ, that might be a good consideration for the restraint he thus imposes on himself." (*Accord. Wallis v. Day*, 2 M. & W. 273. *Pilkington v. Scott*, 15 M. & W. 657.) "But if no such thing exists, but, on the contrary, I find it possible that no employ might, for a considerable time, be given to him, then there is no adequate

consideration." "The restraint on one side meant to be enforced," said Lord Ellenborough, in *Gale v. Reed*, 8 East, 86, "should in reason be co-extensive only with the benefits meant to be enjoyed on the other."

In the case of *Hitchcock v. Coker*, in the Exchequer Chamber, in error from Q. B., 6 A. & E. 439, it was contended that the court could not inquire into the *adequacy* of the consideration when once shown to possess some *bonâ fide* legal value. That case perhaps turned less on *adequacy* than *reasonableness*. In the course of the argument, Alderson, B., observed, that "if the consideration were so small as to be colourable, the agreement would be bad." In *Leighton v. Wales*, 3 M. & W. 551, Parke, B., is reported to have said, that "it is clear since the case of *Hitchcock v. Coker*, that the court cannot inquire into the extent or adequacy of the consideration;" and in *Archer v. Marsh*, 6 A. & E. 966, the judgment in which was delayed to await the decision of *Hitchcock v. Coker*, the Queen's Bench finally pronounced that case to have decided that the parties *must act on their own view as to the adequacy of the compensation*. And again in *Pilkington v. Scott*, 15 M. & W. 657, (where the contract was not under seal,) the same doctrine was emphatically repeated, and the law then stated by Alderson, B., may now be considered settled,

viz., "that if it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful; the only question being whether there is a consideration to support it, and the adequacy of the consideration the court will not inquire into, but will leave the parties to make the bargain for themselves. Before the case of *Hitchcock v. Coker*, a notion prevailed that the consideration must be adequate to the restraint; that was in truth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain."

If there be objected to this view an inconsistency with the decisions that to create a valid restraint of trade some consideration is necessary, even in the case of a contract under seal, *Hutton v. Parker*, 7 Dowl. 739, (which in general wants no consideration, *Cooch v. Goodman*, 2 Q. B. 580; see *Pitman v. Woodbury*, 3 Exch. 4; *Swatman v. Ambler*, 8 Exch. 72; *Morgan v. Pike*, 14 C. B. 473,) the answer is easy; it is this, that consideration is here required for a different reason from that whereon the ordinary law of contracts without consideration rests, the reason being that it would be *unreasonable* for a man to enter into such a stipulation without some consideration, though it must be left to his sense of his own interest to determine what should be the amount or nature of that consideration. And this appears to have been the view

taken by Parke, B., in *Wallis v. Day*, 2 M. & W. 277, and by the Court of Exchequer in *Mallan v. May*, 11 M. & W. 665, where Parke, B., in delivering judgment, recognised the proposition of Tindal, C. J., in *Horner v. Graves*, 7 Bing. 744, that "contracts in restraint of trade are in themselves, if nothing shows them to be *reasonable*, bad in the eye of the law;" and proceeded to add, that "therefore if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which rendered such a contract *reasonable*, the instrument is void." And it seems not improbable, now that the doctrine of *adequacy of consideration* is overturned by *Hitchcock v. Coker*, and *Archer v. Marsh*, that several of the contracts which formerly would have been open to the objection of inadequacy of consideration, may be held upon the same grounds obnoxious to that of *unreasonableness*: for instance, the contract in *Young v. Timmins* might possibly be held an *unreasonable* one, and the decision sustained on that ground. In the case of a contract under seal, if the above observations be correct, it may be thought to follow that any consideration on which a man might reasonably act, though not sufficient to sustain a promise not

under seal, ought to be held to satisfy the rule acted on in *Hutton v. Parker*, provided always that the deed be not open to either of the other objections mentioned in the note. But the decisions, it must be admitted, do not expressly warrant that conclusion, and it is so hard to conceive of a *reasonable* contract of this nature without some consideration, that the precise question seems unlikely to arise. In *Saintier v. Ferguson*, 7 C. B. 716, the engagement by the defendant, a surgeon at M., of the plaintiff as his assistant, though the term and conditions of the engagement were not shown, was held to be a sufficient consideration for a promise not at any time to practise at M. or within seven miles of it.

Lastly, it is not sufficient that the restraint should be partial, and founded upon consideration. The agreement must be *reasonable*. "We do not see (says Tindal, C. J., in *Horner v. Graves*, 7 Bing. 743) how a better test can be applied to the question, whether reasonable or not, than by considering *whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public*. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive, and, if oppressive, it is in the eye

of the law unreasonable. Whatever is injurious to the interest of the public is void, on the grounds of public policy. No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which excessive. In *Davis v. Mason*, 5 T. R. 118, where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable; and in one of the cases, 150 miles was considered as not an unreasonable distance, where an attorney had bought the business of another who had retired from his profession. But it is obvious that the business of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case were such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are, if nothing more appears to show them reasonable, bad in the eye of the law." In *Horner v. Graves*, an agreement that the defendant, a surgeon dentist, would abstain from practising within 100 miles of York, was held void, on the ground that the distance rendered it unreasonable. [In the case of a horsehair manufacturer, 200 miles was considered not to be too long a distance: *Harms v. Parsons*, 32 Beav. 328; 32 L. J. Cha. 247.] In-

stances in which the distance has been held not too large, and the contract consequently reasonable, may be found in *Chesman v. Nainby*, *Clerk v. Comer*, *Davis v. Mason*, and *Bunn v. Guy*, and *Whittaker v. Howe*, above cited. See also *Leighton v. Wales*, 3 M. & W. 545. [In *Jones v. Lees*, 1 H. & N. 189, a patentee of improvements in stubbing machines bound the defendant by deed to use the patent during the term for which it was granted, the latter covenanting not to make or vend any such machines during that term without applying the invention to them. This restraint, which was partial with regard to the mode of exercising the trade, but total in respect of space, was held to be reasonable; and judgment was given for the plaintiff on demurrer to a plea to a count on the covenant, which alleged that the invention was worthless, and that the machines were rendered unsaleable by applying it to them.]

In *Hitchcock v. Coker*, 6 A. & E. 439, where A. in consideration of B. employing him as his assistant at a salary, in the business of a chemist, agreed not to carry on business within three miles of T., it was urged that this was *unreasonable*, because not limited to B.'s *life or continuance in trade*. But held good, for *per* Tindal, C. J., "it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or

value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee or executor. And the only effectual mode of doing so appeared to be by making the restriction of the servant's setting up the trade within the given limit co-extensive with the servant's life." In *Hastings v. Whittey*, 2 Exch. 611, a bond conditioned for payment if the obligor should at any time after, &c., practise at S. "without the consent in writing of the obligee," was held not to be limited to the lifetime of the obligee. See *Archer v. Marsh*, 6 A. & E. 966, and *Ward v. Byrne*, 5 M. & W. 548, where a condition not to *follow or be employed in* the business of a coal-merchant for nine months was held unreasonable. [See also *Sainter v. Ferguson*, 7 C. B. 716, and *Mumford v. Gething*, 7 C. B. N. S. 305 and 316, note (a).]

In the cases of *Mallan v. May*, 11 M. & W. 653, 13 M. & W. 511, *Green v. Price*, 13 M. & W. 695, *Price v. Green*, 16 M. & W. 346, [and *Mumford v. Gething*, *supra*,] but more especially in the highly instructive judgment of the Court of Exchequer in *Mallan v. May*, the doctrine of the principal case was much discussed and fully confirmed. In *Mallan v. May*, 11 M. & W. 653, the agreement was one by which the defendant was to become assistant to the plaintiffs in their business of dentists for four years; the plaintiffs were to

instruct him in the business; and the defendant covenanted not, after the expiration of the term, to carry on the same business in London or in any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising before the expiration of the service. Parke, B., in delivering the judgment of the court, pointed out that contracts for the partial restraint of trade are in fact, in many cases, beneficial to the public; and he instanced the case of a tradesman selling his shop with a contract not to carry on the trade in the same place, which is in effect the sale of a good will, "and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry," and also that of a manufacturer or professional man taking an assistant into his service, with a stipulation that he shall not carry on the same business within certain limits. "In such a case," said his lordship, "the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction on the secrets of his trade and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business." And the covenant was, in that case, adjudged to be

divisible, and to be not an unreasonable restriction so far as it related to not practising in London, though it was stated on the record that London had more than a million of inhabitants; and the court doubted the propriety of taking the comparative populousness of particular districts, the number of men of the same profession, the habits of the people in the neighbourhood, or other like matter of a fluctuating and uncertain character into consideration, and expressed an opinion "that it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and if the limit stipulated for did not exceed that, to pronounce the contract to be valid." On the other hand, the rest of the covenant, relating to not practising in any of the towns or places in England or Scotland where the plaintiff or the defendant on their account might have been practising before the expiration of the service, was holden unreasonable and void, as going beyond what the protection of the plaintiff's interests could reasonably require, and putting into their hands the power of preventing the defendant from practising anywhere. [The above passage from Baron Parke's judgment in *Mallan v. May*, was cited by Erle, C. J., in *Mumford v. Gething*, 7 C. B. N. S. 305, who there said, "I think that contracts

in partial restraint of trade are beneficial to the public, as well as to the immediate parties; for if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a *confidential* capacity; seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers, and their mode of conducting business, and then transferring their services to a rival trader. It appears to me highly important that persons like this defendant" (a commercial traveller) "should be able to enter into contracts of this sort, which afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice." In *Green v. Price*, 13 M. & W. 695, a perfumer sold to his co-partner his share of the business of the firm, and covenanted not to carry on the same business in the cities of London and Westminster, or within 600 miles from the same respectively, binding himself to performance in a sum of 5000*l.* by way of liquidated damages, and not of penalty. The Court of Exchequer, acting upon the authority of *Mallan v. May*, held the covenant *valid* as to practising in London and Westminster, and merely *void* as to the residue, and the defendant being shown to have practised in London, judgment was given for the plaintiff for the whole amount of the 5000*l.*,

which judgment was affirmed in the Exchequer Chamber, *Price v. Green*, 16 M. & W. 346; and see *Nicholls v. Stretton*, 10 Q. B. 346. In *Tallis v. Tallis*, 1 E. & B. 391, the rule was acted upon, that such a covenant is valid, unless it *plainly appears that a restriction is imposed by it beyond what the interest of the plaintiff requires*; and a covenant restraining a partner in the publishing trade from carrying on the business of soliciting purchasers for works of which the copyright had expired published in parts, (known as the canvassing trade,) within 150 miles of the General Post Office, was upheld; and a plea, stating various reasons of expediency, against the validity of the covenant under the peculiar circumstances of the case, was held bad, as *not shewing plainly* that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's publications were excluded. See *Avery v. Langford*, 1 Kay, 663.

It may be worth noticing, that in *Mallan v. May*, 13 M. & W. 511, the word "London" in the contract was considered to mean the city of London, that being its strict and proper meaning, and there being nothing in the contract to prevent its being so construed. It seems, however, open to explanation in each case, in what sense the word is used. See *Beckford v. Cantwell*, 1 M. & Rob. 187, 5

C. & P. 242, S. C.; *Smith v. Smyth*, 10 Bing. 406; [*Wallace v. The A. G.*, 33 L. J. Cha. 314.]

If the contract is reasonable when made, subsequent circumstances, such as the fact of the covenantor ceasing business, so as no longer to want the protection, do not affect its operation. *Elves v. Crofts*, 10 C. B. 241; [and *Jones v. Lees*, 1 H. & N. 189.]

As to what is a breach of a contract not to carry on business in a particular place, see *Turner v. Evans*, 2 E. & B. 512; 2 De G. M. & G. 740; [*Brampton v. Beddoes*, 13 C. B. N. S. 538; or that trade shall not be carried on on certain premises; see *Kemp v. Sober*, 1 Sim. N. S. 517; 20 L. J. Cha. 602, and *Wickenden v. Webster*, 6 E. & B. 387. A covenant that trade shall not be carried on in a certain house is enforceable by injunction. *Hodgson v. Coppard*, 30 L. J. Cha. 20; as to trade secrets, see *Morrison v. Moat*, 9 Hare, 241.]

Under the same head as contracts in restraint of trade, may be classed those by which the services of individuals are secured for a specified time, or for life, to a particular master. There seems to be no objection to such contracts, even when they extend over the whole period of the life of the servant, though in some countries a restraint so extensive has been considered inconsistent with individual liberty, and accordingly forbidden. The question, however, appears to have been long since

settled in our law, without regard to considerations which seem to embrace a shadow. See *Wallis v. Day*, 2 M. & W. 277. And in *Pilkington v. Scott*, 15 M. & W. 657, and *Hartley v. Cummings*, 5 C. B. 247, agreements whereby, in substance, workmen engaged to serve, for a term of years, certain persons or their firm and no others, at a certain scale of wages, subject to determine in the event of sickness or incapacity of the men, or cessation of business by the employers, with power to the employers to dismiss the workmen in certain events, or on certain notice, were considered open, neither to the objection of want of mutuality, or of interference with public policy.

Here may be noticed a dictum in *Wallis v. Day*, 2 M. & W. 281, that according to 15 Viner, 323, Master and Servant, (N.) 5, "in order to maintain an action against a person who contracts to serve for life, the contract must be by deed." However, all that was necessary in *Wallis v. Day* was to show that such a contract was not illegal, and not that it must be under seal; and on reference to the authority mentioned in the passage from Viner, viz., H. 2 H. 4, fol. 14, pl. 12, the point there really decided will be found to be, that an action of *debt* on simple contract was not then, (as it is now, by 3 & 4 W. 4, c. 42, s. 14, see *Barry v. Robinson*, 1 N.R. 293,) maintainable against *executors*,

and the passage in Viner itself does not relate to the subject of master and servant generally, but to the construction of the statute of labourers; so that the dictum in *Wallis v. Day* can hardly be considered, what it seemingly was not intended to be, an authority for the proposition that a contract to serve for life must be under seal.

As to the legality of combinations on the part of workmen to raise, or of masters to lower wages, as tending to impede the free course of trade and manufacture, see *Hilton v. Eckersley*, [6 E. & B. 47, affirmed in error *Ib.* 66, and the 22 Vict. c. 34; and *Walsby v. Anley*, 30 L. J. M. C. 121. As to the effect of rules framed by committees of workmen or masters, see *Levey v. Hill*, 3 H. & N. 702.]

In *Calder and Hebble Navigation v. Pulling*, 14 M. & W. 76, a by-law of a canal company directed against Sunday trading and travelling was held void upon the construction of the local act, which, though very general in its terms, was considered not to give the company any power to restrain the traffic on the canal, for the purpose of enforcing the proper observance of religious duties.

On the same reason with bonds and contracts in restraint of trade, stand *perpetuities*; attempts to create which are never permitted by the law to succeed, on account of the tendency of such limitations

to paralyse trade, by shackling property, and preventing its free circulation for the purposes of commerce: for *trade* consists in the free application of labour to the free circulation of property, and any restraint laid upon the one would be as injurious to its interests as if imposed upon the other. This doctrine of *perpetuities*, as it is called, is of comparatively modern introduction. Its objects were, indeed, at a very ancient period of English law, in some degree accomplished by a maxim which is recognised by our earliest writers, *viz.*, that *property has certain inseparable incidents, among which is the right of aliening it by the assurances appropriated by the law to that purpose, of which incidents it cannot be deprived by any private disposition*. One of the earliest cases in which this doctrine was maintained is reported by *Littleton*, sect. 720, who tells us that “a certain Justice of the Common Place dwelling in Kent, called *Richel*, had issue divers sons and his intent was that his eldest son should have certain lands and tenements to him and the heirs of his body begotten, and, for default of issue, the remainder to the second son, &c., and so to the third son, &c.; and because he would that none of his sons should alien or make warrantie to bar or hurt the others that should be in the remainder, &c., he causeth an indenture to be made to this effect,

viz., that the lands and tenements were given to his eldest son, upon such condition, that if the eldest son alien in fee, or in fee tail, &c., or if any of the sons alien, &c., that then their estate should cease, and be void, and that then the same lands and tenements immediately should remain to the second son, and the heirs of his body begotten, *et sic ultra*, the remainder to his other sons; and livery of seisin was made accordingly.” This device, however, was held void; and Mr. Butler remarks, in a learned note to Co. Litt. 379, b., the perusal of which is strongly recommended to readers desirous of pursuing this subject, that “this was one of the many attempts which have been made to restrain that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1 Burr. 84.” Upon the same principle, *viz.*, that property cannot by any private disposition be robbed of its incidents, of which the power of alienation is one, proceeds the case put by Littleton, at sect. 360, *viz.*: “Also if a feoffment be made on this condition, *that the feoffee shall not alien the land to any*, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person, by the law. For, if such a condition should be good, then the condition should oust him of all the power

which the law gives him, which should be against reason; and therefore such a condition is void." On which Lord Coke observes that "the like law is of a devise in fee on condition that the devisee shall not alien; the condition is void and so it is of a grant, release, confirmation, or any other conveyance, whereby a fee simple doth pass; for it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien: and so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest and property therein, upon condition that the donee or vendee shall not alien the same, the same is void; because his whole interest and property is out of him, so as he hath no possibility of a reverter, *and it is against trade and traffic, and bargaining and contracting between man and man.*" On this doctrine, *viz.*, that property cannot be deprived of the power of alienation legally incident to it, by any private disposition, equity has ingrafted one exception, by allowing married women to be restrained from aliening, by way of anticipation, property limited to their sole and separate use during the coverture. The precise extent to which this equitable doctrine may be carried was long *in incerto*, and this uncertainty has given rise to a great deal of interesting discus-

sion, a full account of which will be found in a very clearly and ably written pamphlet published by Mr. Hayes, upon that subject. See now *Tullett v. Armstrong*, before the L. C., an account of which in its earlier stages will be found in the last edition of *Hayes on Conveyancing*. By the judgment in that case, and in *Scarborough v. Borman*, both reported 4 Myl. & Cr. 377, the doctrine of equity respecting property given to the separate use of a woman, with a prohibition against anticipation, has been definitely settled upon reasoning which applies equally where the property is a fee or less estate, realty or personalty; see *Bagget v. Meux*, 1 Phil. 627; [*Goulden v. Cann*, 5 Jur. N. S. 1196.] The result of the above cases is, that where property of any kind is given or settled to the separate use of a woman for any estate, and she is prohibited against anticipating it, she will, although discoverte when the gift or settlement takes effect, be effectually prevented from anticipating the property during any subsequent coverture to which she may become subject. Also, see *Brown v. Bamford*, 1 Phil. 620; [*Peillon v. Brooking*, 25 Beav. 218; *Wheelwright v. Wheelwright*, 2 Jur. N. S. 554. No particular form of words is required to impose a prohibition against anticipation, *Baker v. Bradley*, 7 De G. M. & G. 597.]

To return to the head of *per-*

petuities. It was in time found that the interests of commerce were by no means sufficiently guarded by the assertion of the maxim, that property could not be robbed of the quality of transferability; for it would have been easy to limit particular estates in such a manner as to postpone the actual enjoyment of the fee so long as to create what would have been virtually, though not nominally, a strict entail; had not the courts, proceeding on the maxim of law, *quodcunque prohibetur fieri ex directo prohibetur et per obliquum*, established, as an inflexible rule, "that though an estate may be rendered inalienable during the existence of a life, or of any number of lives, in being, and twenty-one years after; *Cadell v. Palmer*, 10 Bing. 140; or possibly even for nine months beyond the twenty-one years, in case the person ultimately entitled to the estate should be an infant *in ventre sa mere* at the time of its accruing to him, yet, that all attempts to postpone the enjoyment of the fee for a longer period are void;" and therefore in the famous case of *Spencer v. Duke of Marlborough*, 3 Bro. P. C. 232, Eden. 404, where John Duke of Marlborough devised to trustees and their heirs, to the use of his daughter for life, remainder to Lord Ryalton for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Lord Ryalton in tail male, remainder to Lord Robert Spencer for life, remainder to trustees to preserve contingent remainders, &c., remainder to Charles Spencer in the same manner, and inserted a clause empowering his trustees, on the birth of each son of Lord Ryalton, Lords Robert and Charles Spencer, to revoke and make void the respective uses limited to their respective sons in tail male, and in lieu thereof to limit the premises to the use of such sons for their lives with immediate remainder to the respective sons of such sons severally and respectively in tail male, Lord Northington declared the clause void, as tending to a perpetuity; and on appeal to the Lords, the judges were unanimously of the same opinion. See *Cruise's Digest*, title 32, c. 23; *Beard v. Westcott*, 5 B. & A. 801; *Cadell v. Palmer*, *ubi supra*; and Mr. Butler's note, Co. Litt. 379 b. [See also *Harding v. Nott*, 7 E. & B. 650; *Lewis on The Law of Perpetuity*; 1 *Jarman on Wills*, 2nd Ed. 650; and *Kep- pel v. Bailey*, 2 Mylne & K. 517. It does not appear to be settled whether the rule as to perpetuities applies where the party who is, or whose heirs are to take, and who can dispose of, release, or alienate the estate, is ascertained. See *Gilbertson v. Richards*, 4 H. & N. 277; affirmed 5 H. & N. 453; 29 L. J. Exch. 213, S. C.; where in a mortgage in fee, with a power of

sale on default, and covenants for quiet enjoyment until default, a proviso that on entry for default the land should be charged with a rent-charge payable to the mortgagor and his assigns was held to be valid.]

Lord Coke has laid it down, 1 Inst. 206, that "if a feoffee be bound in a bond that the feoffee and his heirs shall not alien, this is good, for he may notwithstanding alien, if he will forfeit his bond that he himself hath made." And in *Freeman v. Freeman*, 2 Vern. 233, a father settled lands on his son in tail, and took a bond from him that he would not dock the entail. On a bill to be relieved against this bond, the court held it good, because, if the son had not agreed to give his bond, the father might have made him only tenant for life.

It seems, however, that the above opinion of Lord Coke cannot be supported; for, if a general restraint or alienation be, as it unquestionably is, contrary to public policy, there is no more reason for supporting a bond made to enforce it, than for supporting a bond in general restraint of trade. And in a case where A., having limited lands to B. in tail, took a bond from him not to commit waste, it was decreed to be delivered up to be cancelled, the court saying that it was an idle bond. *Jervis v. Bruton*, 2 Vern. 251. So, where an elder

brother enfeoffed his second brother in tail, remainder to a younger brother in the like manner, and made each of them enter into a statute with the other that he would not alien; because these statutes were in substance to make a perpetuity, they were ordered to be cancelled by the Court of Chancery, with the advice of Lord Coke himself. *Poole's Case*, Moore, 810.

It only remains to remark, that *trusts for accumulation*, which, being thought to partake of the objectionable nature of perpetuities, were formerly bounded by the same limits (see *Thellusson v. Woodford*, 4 Ves. jun. 227; [*Williams v. Lewis*, 6 H. of Lords' Cases, 1013; *Lord Rendlesham v. Roberts*, 23 Beav. 321]), are now regulated by a statute of their own, 39 & 40 G. 3, c. 98, which enacts that no person, after the passing of that act (28th July, 1800), shall, by any *deed or will*, "settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than for the life or lives of any such grantor or grantors, settlor or settlors, or the term of 21 years from the death of any such grantor or grantors, settlor or testator, or during the minority or respective minorities of any person or persons who shall be

living or *in ventre sa mere* at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulations, would, for the time being, if of full age, be entitled to the rents, issues, profits, and produce of such property so directed to be accumulated. And in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to accumulate contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

Provided always, that nothing in that act contained should extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of any timber or wood upon any lands or tenements, but that all such provisions and directions

may and shall be made and given as if that act had not passed. See, on the construction of this statute, *Griffiths v. Vere*, 9 Ves. jun. 127; *Longden v. Simson*, 12 Ves. 295; *Southampton v. Hertford*, 2 V. B. 54; *Marshall v. Holloway*, 2 Swanst. 432; *Haley v. Bannister*, 4 Madd. 275; *Shaw v. Rhodes*, 1 Myl. & Cr. 135. S. C. on appeal, 5 Cl. & F. 114 nom. *Evans v. Hellier*; *Pride v. Fooks*, 2 Beav. 430; *Webb v. Webb*, *ibid.* 493; *Ellis v. Maxwell*, 3 *ib.* 587; *Broughton v. James*, 1 Coll. 26; *A. G. v. Poulden*, 3 Hare, 555; *Elborne v. Good*, 14 Sim. 165; *Wilson v. Wilson*, 1 Sim. N. S. 288; *Re Rosslyn's Trust*, 16 Sim. 391; *Halford v. Stains*, 16 Sim. 488; *Ellis v. Maxwell*, 12 Beav. 104; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Barrington v. Liddel*, 2 De G. M. & G. 480; *Edwards v. Tuck*, 3 De G. M. & G. 40; *Peard v. Kekewich*, 15 Beav. 166; *Middleton v. Losh*, 1 Sm. & G. 61; *Bryan v. Collins*, 16 Beav. 17; *Tench v. Cheese*, [6 De G. M. & G. 453; *Turvin v. Newcome*, 3 Kay & J. 16; *Beech v. Viscount St. Vincent*, 3 Jur. N. S. 762; *In re Clulow*, 5 Jur. N. S. 1002; S. C. 28 L. J. Cha. 696; *Macpherson v. Stewart*, 28 L. J. Cha. 177; *Oddie v. Brown*, 4 De G. & J. 179; *Varlo v. Faden*, 27 Beav. 255; *Drewitt v. Pollard*, 27 Beav. 196; *Wilson v. Wilson*, 20 L. J. Cha. 365; *In re Blakemore*, 20 Beav. 214; 1 *Jarman on Wills*, 2nd Ed.

246; *St. Aubyn v. St. Aubyn*, 1 *A. G. v. Greenhill*, 33 *Beav. Drew. & Sm.* 613; 30 *L. J. Cha.* 193; 33 *L. J. Cha.* 208; *Combe* 917; *Watt v. Wood*, 31 *L. J. Cha.* 338; *Gosling v. Gosling*, and *Greene v. Gascoyne*, 34 *L. J. Cha.* 233; *Wetherell v. Wetherell*, 32 *L. J. Cha.* 476; *The*

SIMPSON v. HARTOPP.

MICH. 18 GEO. 2.—C. B.

[REPORTED WILLES, 512.]

Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises. But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent.

THE opinion of the court was delivered, as follows, by Willes, Lord Chief Justice. Trover. This comes before the court on a special verdict found at the Leicester assizes, held at Leicester, on the 3rd of August, 1743.

The plaintiff declared against the defendant, for that on the 20th October, 1741, he was possessed of one frame for the knitting, weaving, and making of stockings, value 20*l.*, as of his own proper goods, and being so possessed, he lost the same, and that afterwards, *to wit*, on the 18th of August, 1742, it came to the hands of the defendant, who knowing the same to be the goods of the plaintiff, afterwards, *to wit*, on the 19th day of the same month of August, converted the same to his own use ; damage 30*l.*

The defendant pleads *not guilty* ; and the jury find that the plaintiff, on the 27th of March, 1741, was possessed of one frame for knitting, weaving, and making stockings, value 8*l.*, as his own proper goods. That upon that day he let the said frame to John Armstrong, at the weekly rent of 9*d.*, and so from week to week, as long as they the said Nathaniel Simpson, the plaintiff, and John Armstrong,

should please: by virtue of which letting, the said John Armstrong was possessed of the said frame, at the said rent, until the time after-mentioned, when the same was seized as a distress for rent by the defendant. That the said John Armstrong is by trade a stocking-weaver, and used the said stocking-frame as *an instrument of his trade*, and continued the use thereof, and his apprentice was using the said stocking-frame at the time thereafter mentioned, when the same was seized by the defendant as a distress for rent. That the said John Armstrong held of the defendant a certain messuage and tenement in the parish of Woodhouse and county of Leicester, by virtue of a lease to him the said John Armstrong thereof granted by the defendant under the yearly rent of 35*l.* for a term of years not yet expired, and was in the actual possession of the same when the said stocking-frame was distrained for rent by the defendant. That on the 19th of December, 1741, John Armstrong was indebted to the defendant in 53*l.* for arrears of rent of the said messuage and tenement; and that the said stocking-frame was then upon the said messuage in the possession of the said John Armstrong, and that there were not goods or chattels by law distrainable for rent in the said messuage without the said stocking-frame sufficient to satisfy the said rent so in arrear, at the time when the said stocking-frame was seized as a distress for the said rent. That on the said 19th of December the defendant entered in the said messuage and tenement, and then and there seized the said stocking-frame on the said premises as a distress for the said rent so in arrear, as the said John Armstrong's apprentice was then weaving a stocking on the said frame. And that the defendant (though often requested) hath refused to deliver the said stocking-frame to the said plaintiff, and continues to detain the same. The special verdict concludes, as usual, by submitting the matter to the opinion of the court whether the said stocking-frame was by law distrainable for the said arrears of rent or not; and if the court should be of opinion that it was not, they assess the damages of the plaintiff at 8*l.*, &c.

Upon this special verdict three questions arise :—

First, Whether a stocking-frame has any privilege at all as being an instrument of trade, or whether it be generally distrainable for rent as other goods are, even though there was sufficient distress besides.

Secondly, Though it may be so far privileged as not to be distrainable if there be other goods sufficient, yet whether or not it may be distrained if there be not sufficient distress besides.

Thirdly, Though it be distrainable either in the one case or the other when it is not in actual use, yet whether or no it has not a particular privilege by being *actually in use* at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very case now in question.

There are five sorts of things which at common law were not distrainable :

1st. Things annexed to the freehold.

2nd. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.

3rd. Cocks or sheaves of corn.

4th. Beasts of the plough and instruments of husbandry.

5th. The instruments of a man's trade or profession.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The two last are only exempt *sub modo*, that is, upon a supposition that there is sufficient distress besides.

Things annexed to the freehold, as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, *because they cannot be taken away without doing damage to the freehold*, which the law will not allow.*

Things sent or delivered to a person exercising a trade to be carried, wrought, or manufactured in the way of his

in *Hellawell v. Eastwood*, 6 Exch. 311, where the reasons given are that such things cannot be restored in the same plight, and that a distress cannot be of the thing itself which is demised. See also *Mather v. Fraser*, 2 Kay & J. 549; and *Walmesley v. Milne*, 7 C. B., N. S. 115.]

* [See *Darby v. Harris*, 1 Q. B. 894; *Gilbert on Distresses*, 34 & 48, recognised

trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged *for the sake of trade and commerce*, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5 (which was made in favour of landlords), because they *could not be restored again in the same plight and condition* that they were before upon a replevin, but must necessarily be damaged by being removed.

Beasts of the plough, &c., were not distrainable *in favour of husbandry* (which is of so great advantage to the nation), and likewise *because a man should not be left quite destitute of getting a living for himself and his family*. And the same reasons hold in the case of the instruments of a man's trade or profession.

But these two last are privileged in case there is distress enough besides ; otherwise they may be distrained.

These rules are laid down and fully explained in Co. Lit. 47, a., b., and many other books which are there cited ; and there are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered ; for as the stocking-frame in the present case could only be privileged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides. These are the words in Carth. 358, in the case of *Vinkinstone v. Ebdon*, " the very implements of trade may be distrained if no other distress can be taken."

But whether or no this stocking-frame's being actually in use at the time of the distress gives any further privilege, is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent, for these two plain reasons :

1st. *Because it could not be restored again upon a replevin in the same plight and condition as it was*, but must be damnified in removing, for the weaving of the stocking would at least be stopped, if not quite spoiled, which is the very reason of the case of corn in cocks, &c.

2ndly. Whilst it is in the custody of any person, and used by him, it is a breach of the peace to take it. And these are two such plain and strong reasons, that even if it were quite a new case, I should venture to determine it without any authority at all ; but I think that there are several cases and authorities which confirm this opinion.

It is expressly said in Co. Lit. 47, a., that a horse whilst a man is riding upon him, or an axe in a man's hand cutting wood, and the like, cannot be distrained for rent. In *Bracton*, and several other old books, there is a distinction made between *catalla otiosa* and things which are in use. It was held in P. 14 H. 8, pl. 16, that if a man has two millstones, and only one is in use, and the other lies by not used, it may be distrained for rent. In *Read's Case*, Cro. Eliz. 594, it was holden that yarn carrying on a man's shoulders to be weighed could not be distrained any more than a net in a man's hand, or a horse on which a man is riding. So in Moor 214, *The Viscountess of Bindon's Case*, it is said that if a man be riding on a horse, the horse cannot be distrained, but if he hath another horse, on which he rides sometimes, his spare horse may be distrained.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case which seems to look the contrary way, which is the case of *Webb v. Bell*, 1 Sid. 440, where it was holden that two horses and the harness fastened to a cart loaden with corn might be distrained for rent. But in the first place, I am not clear that this case is law ; and besides, it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent ; and therefore a *quære* is made whether if a man had been on the cart the whole had not been privileged, which

is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities, we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises, and therefore judgment must be for the plaintiff.

THIS is usually cited as a leading case, whenever a question arises respecting the exemption of property from distress, and deservedly so, for it would be difficult to find a clearer summary of the authorities as they existed at the time when it was decided, than is contained in the judgment of the Lord Chief Justice. "It is," said Buller, J., 4 T. R. 568, "a case of great authority, because it was twice argued at the bar; and Lord Chief Justice Willes took infinite pains to trace with accuracy those things which are privileged from distress."

There are, according to his lordship, five sorts of property privileged from distress for rent by the common law, and to these the judgment in the principal case authorises us to add a sixth. The list then will stand thus:—

Things absolutely privileged at common law.

1. Things annexed to the freehold.
2. Things delivered to a person

exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ.

3. Cocks and sheaves of corn, and other things which cannot be restored in the same plight.

4. Things in actual use.

With respect to the first class, *viz. fixtures*. It was always held for clear law, that they were not distrainable, for the reason stated by the Chief Justice; see 4 T. R. 567; [*Darby v. Harris*, 1 Q. B. 895; Gilbert on Distresses, 34 and 48; *Hellawell v. Eastwood*, 6 Exch. 311]; and there is a distinction in this respect between a distress and an execution; for, under the latter, fixtures, which would be removable by the defendant, as between him and his lessor, may be seized; *Poole's Case*, 1 Salk. 368. See 3 Atk. 13, 3 B. & C. 368; *Place v. Fagg*, 4 M. & R. 277; and so may growing corn, *Ib.*, though neither the tenant's fixtures, nor the growing corn, would at common law have

been distrainable, *Darby v. Harris*, *supra*; *Dalton v. Whitten*, 3 Q. B. 961. However, as respects the growing corn, the law is now altered by st. 11 G. 2, c. 19, s. 8, which enacts that landlords or their bailiffs, or other persons empowered by them, may distrain corn, grass, or *other product* growing on any part of the land demised. The words *other product* have been explained to apply only to other products of a nature similar to the things specified, that is to say, product to which the process of ripening, and being cut, gathered, made, and laid up when ripe, is incidental. Therefore, trees or shrubs growing in a nursery ground are not distrainable under this statute. *Clark v. Gaskearth*, 8 Taunt. 431. See, too, the further qualifications introduced by 56 G. 3, c. 50, s. 6, and see *Wright v. Dewes*, 1 A. & E. 641; and 1 M. & W. 448. In a case in the Court of Exchequer, where A. T. had granted to B. H. an annuity, charged on certain premises, and empowered him to distrain for the arrears, and "to detain, manage, sell, and dispose of the distresses in the same manner, in all respects, as distresses for rents reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years," the court thought that these words did not empower the grantee to distrain *growing crops*, but only conferred upon him the powers given to

landlords by st. 2 W. & M. cap. 5. See *Miller v. Green*, 2 Tyrwh. 1, 2 C. & J. 143, 8 Bing. 92; and *Johnson v. Faulkner*, 2 Q. B. 923. Machinery fixed to the freehold, not for the improvement or profitable use of the land, but only for the purpose of being more conveniently used as machinery; for instance, a mule used for spinning cotton, though sunk into a stone floor, and secured by molten lead, retains its chattel character, and may be distrained for rent. *Hellawell v. Eastwood*, 6 Exch. 295; [recognised in *Waterfall v. Penistone*, 6 E. & B. 876; and distinguished in *Walmsley v. Milne*, 7 C. B. N. S. 115, and see *Gibson v. The Hammersmith Rail. Co.* 32 L. J. Cha. 337, *Elwes v. Mawes*, *post*, vol. ii., and the note thereto. In *Mather v. Fraser*, 2 Kay & J. 536, Wood, V. C., doubted the reasoning in *Hellawell v. Eastwood*, but upon the erroneous assumption that fixtures can be distrained for rent. If a landlord distrains upon goods, and in his notice of distress includes fixtures, expressing an intention to sell them, but no actual seizure or severance of the latter takes place, he is not liable as for an unlawful distress upon the latter; *Beck v. Denbigh*, 29 L. J. C. P. 273.]

2nd. *Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ.* That this class of property is exempt from distress has

never been questioned. See *Gisbourn v. Hurst*, Salk. 249 ; 1 Inst. 47, a. ; and *Gibson v. Ireson*, 3 Q. B. 39, in which the meaning of the phrase "public trade" was discussed. But the dispute has always been in ascertaining whether the goods in each particular case were so circumstanced as to fall within it. The examples commonly cited as being clearly within the rule, are those of cloth bailed to a tailor to make a garment, or a horse standing in a smith's shop to be shod ; so, too, goods of the principal in the factor's hands cannot be distrained by the factor's landlord ; *Gilman v. Elton*, 3 B. & B. 75 ; for the advancement of trade as much requires that goods should be placed in a factor's hands for sale, as in a carrier's for carriage ; and, on the same principle, goods deposited for safe custody in a warehouse or a wharf would not be distrainable for rent due in respect thereof. *Thompson v. Mashiter*, 1 Bing. 283 ; *Mathias v. Mesnard*, 2 C. & P. 353. It has also been decided that goods deposited on the premises of an auctioneer for the purposes of sale, are privileged from a distress for rent due in respect of those premises ; *Adams v. Grane*, 3 Tyrwh. 326 ; 1 C. & M. 390 ; for, to use the words of Bayley, B., "*Interest reipublicæ* to bring buyers and sellers together at fixed places, where goods may be brought for the purposes of sale and exchange. This privilege is, therefore, of great

importance to the owners of goods, who should not be exposed to the risk of losing them, from the default of the parties on whose premises they may be deposited for that purpose." This is so though the place is only temporarily used for the purpose of an auction, and the auctioneer wrongfully there. *Brown v. Arundel*, 10 C. B. 54 ; see *Williams v. Holmes*, 8 Exch. 861. And the Court of Queen's Bench has applied the same law to the case of a commission agent. *Findon v. M'Laren*, 6 Q. B. 891. [So goods pledged with a pawnbroker cannot be taken as a distress, *Swire v. Leach*, 18 C. B. N. S. 479 ; 34 L. J. C. P. 150.] In *Brown v. Shevill*, 2 A. & E. 138, a beast was sent to the premises of Woodham, a butcher, to be slaughtered, and after it had been slaughtered, the carcass was seized for rent due by Woodham. The Court of King's Bench held that it was not distrainable. This species of privilege, as is remarked by Bayley, B., in his judgment in *Adams v. Grane*, "has been from time to time increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances, one of which modern modes of dealing is the case of a factor." His lordship in the same case, cites and approves an observation made by Mr. Justice Blackstone, in his Commentaries, that "the exemption from liability to dis-

tress, in a case of this sort, occasions no hardship, because the privilege is generally applicable to goods which no man could possibly suppose to be the property of the individual from whom the rent is due." In *Muspratt v. Gregory*, 1 M. & W. 633, it was held by the Exchequer, Parke, B., *dissentiente*, and confirmed in error, 3 M. & W. 678, that a barge, which a person meaning to purchase salt sent to the salt-works to carry it home, was not privileged from distress for the arrears of a rent-charge. *Vide tamen*, as to the case of a carriage actually containing privileged goods, *Rede v. Barley*, Cro. Eliz. 596; *Gisbourn v. Hurst*, Salk, 243. The same court subsequently held in *Joule v. Jackson*, 7 M. & W. 450, that brewers' casks left according to the usage of trade on a publican's premises with beer were not privileged.

In the case of *Francis v. Wyatt*, 1 Bl. R. 483, 3 Burr. 1498, the court seemed strongly inclined to think that a carriage standing in the yard of a livery-stable was distrainable for rent due to his landlord by the keeper of the livery-stable; and that opinion was approved and acted upon in *Parsons v. Gingell*, 4 C. B. 545. And in *Wood v. Clarke*, 1 Tyrwh. 314, 1 C. & J. 484, it was held that, though materials delivered by a manufacturer to a weaver, to be by him manufactured at his

own home, were privileged from distress for rent due from the weaver to his landlord (see *Gibson v. Ireson*, 3 Q. B. 39), yet that a frame or other machinery delivered by the manufacturer to the weaver along with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, was not privileged, unless there were other goods upon the premises sufficient to satisfy the rent due. "This case," said Lord Lyndhurst, delivering the judgment of the court, "does not turn upon the privilege of a workman with respect to the implements and machinery by which his trade is to be carried on, but upon the privilege of the person by whom the workman is employed. The plaintiffs, who were the employers, furnished the workman not only with the materials on which he was to work, but also with the machinery by which the materials were to be worked up. The question is as to the extent of the employer's privilege, whether it is confined to the materials which he supplies, or applies also to the machinery by which the working-up is effected. It appears to us that it is confined to the materials, and does not include the machinery." "None of the cases go beyond this: that the material to be worked up is privileged; that the conveyance by which it is carried to and from the place of manufacture is privileged; that it is privileged in the

hands of the carrier while he is carrying it, in the hands of the factor to whom it is consigned, and in the hands and warehouse of a wharfinger, where it is lodged and deposited by the factor. There is no case or dictum that the machinery by which it is to be manufactured is included in the privilege." This decision is approved in *Fenton v. Logan*, 9 Bing. 676. As to cattle on their way to market, see *Nugent v. Kirwan*, 1 Jebb. & S. 97.

As to the mode of pleading this class of exemption see *Gibson v. Ireson*, 3 Q. B. 39.

3. *Cocks and sheaves of corn*, and other things which cannot be restored in the same plight.

See *Wilson v. Duckett*, 2 Mod. 61. The reason for this exemption was, that the distress being at common law merely a pledge things were held not to be distrainable which could not be restored in the same plight as they were in at the time of taking them. And for this reason butcher's meat cannot be distrained, *Morley v. Pincombe*, 2 Exch. 601. But by 2 W. & M. c. 5, sheaves or cocks of corn, or loose corn and hay lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed, to the damage of the owner, from such place; and the landlord has, as it would seem, no

option, but *must* sell at the expiration of five days, per Parke, B., 1 M. & W. 448. The benefit of this statute, at all events since 4 Geo. 2, c. 28, s. 5, extends to the grantee of a rent charge, though according to *Miller v. Green*, above cited, st. 11 G. 2, c. 19, s. 8, does not. *Johnson v. Faulkner*, 2 Q. B. 923.

4. *Things in actual use.*

These, as the text informs us, are privileged in order to prevent the breach of the peace which might be occasioned by an attempt to distrain them. See *Field v. Adames*, 12 A. & E. 652, where a replication that the things were in actual use was held good; and *Bond v. Kennington*, 1 Q. B. 679, where it was bad for want of sufficient averments.

The above four sorts of property are the only sorts where absolute freedom from distress could be deduced from *Simpson v. Hartopp*; it is, however, proper to observe, that there are two other descriptions of goods absolutely privileged from distress at common law: 1st, *Animals feræ naturæ*, and other things, wherein no valuable property is in any person. Finch, 176; Bro. Abr., Property, pl. 20; Com. Dig. Dist. C.; Keilway, 30, b.; Co. Lit. 47, a.; 1 Rolle's Abr. 666. But *deer* in an inclosed ground not being a park do not fall within this exemption, *Davies v. Powell*, Willes, 47; nor deer in a park, unless they are wild, according to *Morgan v. Earl of*

Abergavenny, 8 C. B. 768, from which latter case, if it be law, it should seem to follow that if tenant for life of a park feed deer so as to diminish their wildness, he is in peril of an action for waste, *quære*. [See *Ford v. Tynte*, 31 L. J. Cha. 177, in which *Morgan v. Earl of Abergavenny* was acted upon. Dogs have been said to be protected from distress on the ground that they are animals *feræ naturæ*; but it is clear that this cannot be now said of them, 2 Bl. Comm. 391; and that there may now be a valuable property in them. See the judgment of Willes, C. J., in *Davies v. Powell*, Willes, 46. Indeed, even in Lord Coke's time, trespass or trover would lie for a dog, (*Filow's Case*, 12 Hen. 8, 3 pl. 3,) without averring it to be tame, see *Ireland v. Higgins*, Cro. Eliz. 125; Com. Dig. *Action on the Case upon Trover*, C. *Binstead v. Buck*, 2 Bl. 1117; *Sandys v. Hodgson*, 10 A. & E. 472, and 1 Wms. Saund. 84. Yet Lord Coke (Co. Lit. 472) includes dogs, and upon his authority Rolle (Abr. Dist. H.), Comyns (Dig. Dist. C.), Viner (Abr. Dist. H.), Bacon (N. Abr. Dist. B.), Blackstone (3 Comm. 8), Stephen (Com. 3rd ed. vol. iii. 344), Burton (Comp. 1014), all include dogs in the class of things not distrainable, because not the subject of valuable property, being animals *feræ naturæ*. It is, however, to be observed that Lord Coke in a later part of his Institutes classes

dogs, more correctly it should seem, among those creatures *domitæ naturæ*, in which men may have a property, 4 Inst. 109; although that property appears to be in some sense of a base kind; see the Case of Swans, 7 Rep. 18 a., 1 Hawk. P. C. 314 and 511, where the reason why dogs were not at common law the subject of larceny is stated to be that, although a property may exist in them, yet "in respect of the baseness of their nature, they shall never be so highly regarded at law that for their sakes a man shall die;" and *Filow's Case*, *supra*, where Eliot, J., went so far in his depreciation of these animals as to lay down that dogs are vermin, and for that reason the Church would not debase herself by taking tithes of them; though in Rastal, Ent. 611 b., pl. 10, 1. (see 1 Wms. Saund. 84) it appears that you may justify a battery in defence of your dog. According to the criminal law, dogs, though now by statute the theft of them is punishable (see 8 Vict. c. 47, s. 2), continue not to be considered goods or chattels, *R. v. Robinson*, 28 L. J. M. C. 58. See per Willes, J., in *Cox v. Burbidge*, 13 C. B. N. S. 430; 32 L. J. C. P. 90. In *Davies v. Powell*, *supra*, Willes, C. J., took exception to Lord Coke's rule regarding animals not distrainable, as being "plainly too general, for it is extended to dogs, yet it is clear now that a man may have a valuable

property in a dog." Several text writers have in reliance upon this opinion, distinctly asserted that dogs are distrainable, see, for instance, Burn's Justice, Distress, 2. It may be admitted that if by the common law the remedy by distress did not apply to dogs specifically, no alteration in their qualities, or in the law relating to other remedies respecting them, could render them distrainable; for the maxim "*cessante ratione cessat et ipsa lex*" does not show that a liability of this description will arise whenever the reason for an exemption from it has ceased; yet it is not improbable that Lord Coke in the passage referred to above was only stating the general common law rule with reference to things of no value, and giving what, in his opinion, were instances of the application of that rule. As to the property in several other kind of animals, see *Hannam v. Mochett*, 2 B. & C. 934; and 1 Wms. Saund. 84.] 2ndly. *Things in the custody of the law*, such as property already taken damage feasant or in execution; 1 Inst. 47, a.; Gilb. Dist. ed. 1757, p. 44; *Eaton v. Southby*, Willes, 131; *Peacock v. Purvis*, 2 B. & B. 362; *Wright v. Dewes*, 1 A. & E. 641; whether in the hands of the sheriff or of his vendee, *Wharton v. Naylor*, 12 Q. B. 673; but see as to growing crops, 14 & 15 Vict. c. 25, s. 2. Goods seized by the messenger under a fiat, are not considered to be in *custodiâ legis*,

for this purpose, *Briggs v. Sowry*, 8 M. & W. 729.

Next with respect to *property conditionally privileged*. Of this the Chief Justice enumerates two classes:

1. Beasts of the plough and instruments of husbandry. See *Davies v. Aston*, 1 C. B. 746; [colts, steers, and heifers do not fall within this class, *Keen v. Priest*, 4 H. & N. 236.]

2. The instruments of a man's trade or profession.

[Another class may be added.

3. Beasts which improve the land, as sheep, Com. Dig. Dist. C., whether they belong to the tenant or not, *Keen v. Priest*, *supra*.]

These species of property are privileged, provided that there be other sufficient distress upon the premises; see [Co. Lit.], 47, a., b.; *Fenton v. Logan*, 9 Bing. 676; *Gorton v. Falkner*, 4 T. R. 565; [and if there be, trespass will lie for taking them, *Nargett v. Nias*, E. & E. 439.] It is, however, settled that beasts of the plough may be distrained for poor rates, though there are other distrainable goods on the premises, more than sufficient to answer the value of the demand, *Hutchins v. Chambers*, 1 Burr. 579. This decision proceeded on the analogy between such a distress and an execution. It must further be observed, with respect to things privileged *sub modo*, that, even though there be a sufficient distress besides, yet if that distress consists of growing

crops which are only distrainable by statute, and are not immediately productive, the landlord is not bound to avail himself of it, but may distrain the things privileged *sub modo*, *Pigott v. Birtles*, 1 M. & W. 441. And possibly the principle of this decision may hereafter be thought to extend to every case of a distress given by statute but not liable to precisely the same rules of treatment as a distress at common law.

To the above exceptions it may be well to add, that if a landlord either expressly or impliedly consent that chattels placed by a stranger on the tenant's land shall be exempt from his distress, it appears from *Horsford v. Webster*, 5 Tyrwh. 409, 1 C. M. & R. 696, S. C. [recognised in *Giles v. Spencer*, 3 C. B. N. S. 253], that he will be a trespasser if he detain

them. In that case Parke, B., differed from the rest of the court, conceiving that the consent was not made out under the circumstances. See *Walsh v. Rose*, 6 Bing. 638. [The statutory power of distress given by the 19 & 20 Vict. c. 108, s. 5, for the benefit of landlords in cases in which goods have been seized under the warrant of a county court, does not extend to cases in which the goods seized belong to a stranger and not to the tenant, *Beard v. Knight*, 8 E. & B. 865; *Wilcoxon v. Searby*, 29 L. J. Exch. 154.]

As to distress and sale of goods which the tenant is under covenant to use upon the land, see *Abbey v. Petch*, 8 M. & W. 419; *Frusher v. Lee*, 10 M. & W. 709; *Roden v. Eytton*, 6 C. B. 427, [and *Ridgway v. Lord Stafford*, 6 Exch. 404.]

OMICHUND v. BARKER.

HIL. 18 GEO. 2.—IN CHANCERY.

[REPORTED WILLES, 538.*]

* [Also reported 1 Atk. 21; and 1 Wils. 84.]

The depositions of witnesses professing the Gentoo religion, who were sworn according to the ceremonies of their religion, taken under a commission out of Chancery, admitted to be read as evidence.

SEVERAL persons resident in the East Indies, and professing the Gentoo religion, having been examined on oath administered according to the ceremonies of their religion, under a commission sent there from the Court of Chancery, it became a question whether those depositions could be read in evidence here; and the Lord Chancellor conceiving it to be a question of considerable importance, desired the assistance of *Lee*, Lord Chief Justice, B. R., *Willes*, Lord Chief Justice, C. B., and the Lord Chief Baron *Parker*, who, after hearing the case argued, were unanimously of opinion that the depositions ought to be read.

The case is shortly reported in 1 Wils. 84, and more fully in 1 Atk. 21. The following opinion was delivered by *Willes*, Lord Chief Justice, C. B. "I could satisfy myself by merely saying that as to the present question I am of the same opinion as the Lord Chief Baron; but as this is in a great measure a new case, as it is a question of great importance, and as so much has been said by the counsel on both sides, I believe it will be expected that I should give my reasons for the opinion which I am going to give, though in the course of my argument I must

necessarily touch upon many things that have been already better expressed by the Lord Chief Baron.

Though it be necessary only to give my opinion whether the depositions taken in the present case can be read or not, yet it may be proper, in order to come at this particular question, in the first place to consider the general question, whether an infidel, I mean one who is not a Christian, for in that sense Lord *Coke* certainly meant it, can be admitted as a witness in any case whatsoever. If I thought with my Lord *Coke* that he could not, I must necessarily be of opinion, that the depositions in the present case could not be read as evidence. On the other hand, if I thought that infidels, in all cases and under all circumstances, ought to be admitted as witnesses, the consequence would be as strong the other way, that these depositions ought to be read. But if I should be of opinion (and I shall certainly go no further) that some infidels, in some cases and under some circumstances, may be admitted as witnesses, it will then remain to be considered, whether these infidels, who are examined in the cause under the circumstances in which they appear in this court, are legal witnesses or not.

As to the general question, Lord *Coke* has resolved it in the negative, Co. Lit. 6. b., that an infidel cannot be a witness ; and it is plain by this word "infidel" he meant Jews as well as Heathens, that is, all who did not believe the Christian religion. In 2 Inst. 507, and many other places, he calls the Jews infidel Jews ; and in the 4 Inst. 155, and in several other passages of his books, he makes use of this expression, infidel pagans, which plainly shows that he comprised both Jews and Heathens under the word infidels ; and, therefore, Serjeant *Hawkins* (though a very learned painstaking man) is plainly mistaken in his History of the Pleas of the Crown, 2 vol. p. 434, where he understands Lord *Coke* as not excluding the Jews from being witnesses, but only heathens. But Lord Chief Justice *Hale* understood this in another sense in that remarkable passage of his, which I shall mention more particularly by-and-by. I shall, therefore, take it for

granted that Lord *Coke* made use of the word infidels here in the general sense ; and that will, I think, greatly lessen the authority of what he says ; because long before his time, and of late, almost ever since the Jews have returned into *England*, they have been admitted to be sworn as witnesses. But I think, the counsel for the defendant seemed to mistake the reason upon which Lord *Coke* went. For he certainly did not go upon this reason, that an infidel could not take a Christian oath, and that the form of the oath cannot be altered but by act of parliament ; but upon this reason, though, I think, a much worse, that an infidel was not *fide dignus*, nor worthy of credit ; for he puts them in company and upon the level with stigmatized and infamous persons. And that this was his meaning appears more plainly by what he says in *Calvin's Case*, 7 Co. 17, b., that "all infidels are in law perpetual enemies ; for between them, as with the devils, whose subjects they are, and the Christians, there is perpetual hostility, and can be no peace. For as the apostle saith, 2 Cor. 6. v. 15 : '*quæ conventio Christi cum Belial? Quæ pars fideli cum infideli? Infideles sunt Christi et Christianorum inimici.*' And herewith agreeth the book in 12 H. 8, fol. 4, where it is holden that a pagan cannot maintain any action at all." But this notion, though advanced by so great a man, is, I think, contrary not only to the scripture, but to common sense and common humanity. And I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles ; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce, from which this nation reaps such great benefits. We ought to be thankful to Providence for giving us the light of Christianity, which he has denied to such great numbers of his creatures of the same species as ourselves. We are commanded by our Saviour to do good unto all men, and not only unto those who are of the household of faith. And St. Peter saith, Acts 10, v. 34, 35, that "God is no respecter of persons, but in every nation he that feareth

him and worketh righteousness is accepted with him." It is a little mean narrow notion to suppose that no one but a Christian can be an honest man. God has implanted by nature on the minds of all men true notions of virtue and vice, of justice and injustice, though heathens perhaps more frequently act contrary to those notions than Christians, because they have not such strong motives to enforce them. But as St. Peter says, there are in every nation men that fear God and work righteousness; such men are certainly *fide digni*, and very proper to be admitted as witnesses. I will not repeat what was said by Sir *George Treby*, in the case of monopolies, in the State Trials, vol. 7, p. 402, of this notion of Lord *Coke's*, and which was cited by one of the counsel; but I think it very well deserves every epithet that he has bestowed on it. I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion that an infidel cannot be a witness. For though it may be founded upon some general sayings in Bracton, Fleta, and Briton, and other old books, those I think of very little weight, and therefore shall not repeat them; first, because they are only general *dicta*; and in the next place because these great authors lived in very bigoted popish times, when we carried on very little trade, except the trade of religion, and consequently our notions were very narrow, and such as I hope will never prevail again in this country. As to what is said by that great man the Lord Chief Justice *Fortescue*, in his book *De Laudibus*, b. 26, that witnesses are to be sworn on the Holy Evangelists; he is speaking only of the oath of a Christian, and plainly had not the present question at all in his contemplation. To this assertion of my Lord *Coke's*, besides what I have already said, I will oppose the practice of this kingdom, before the Jews were expelled out of it by the stat. 18 E. 1. For it is plain, both from Madox's *History of the Exchequer*, p. 167 and 174, and from Seld. vol. 2, p. 1469, that the Jews here, in the time of King John and Henry the Third, were both admitted

to be witnesses, and likewise to be upon juries in causes between Christians and Jews, and that they were sworn upon their own books or their own roll, which is the same thing. I will likewise oppose the constant practice here almost ever since the Jews have been permitted to come back again into *England*; viz., from the 19 Car. 2, (when the cause was tried which is reported 2 Keble, 314,) down to the present time, during which I believe not one instance can be cited in which a Jew was refused to be a witness, and to be sworn on the Pentateuch. To this assertion I shall likewise oppose the very great authority of Lord *Hale*, 2 vol. 279. And though this has often been mentioned by the counsel, it is so full of law, of good sense, and the spirit of Christianity, that I think it cannot be repeated too often: *decies repetita placebit*. "It is said by Lord *Coke*, that an infidel is not to be admitted as a witness; the consequence of which would be that a Jew, who only owns the Old Testament, could not be a witness. But I take it, that although the regular oath, as it is allowed of by the laws of *England*, is *tactis sacrosanctis Dei Evangelii*, which supposes a man to be a Christian, yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by Jewish brokers, the testimony of a Jew *tacto libro legis Mosaicæ* is not to be rejected, and is used, as I have been informed, amongst all nations. Yea, the oaths of idolatrous infidels have been admitted by the municipal laws of many kingdoms, especially *si juraverint per verum Deum creatorem*; and special laws are instituted in Spain touching the forms of the oaths of infidels; *vid.* Covarruviam, tom. 1. p. 1, *de juramenti formâ*." And he mentions a case where it would be very hard if such an oath should not be taken by a Turk or Jew, which he holds binding; "for possibly he might think himself under no obligation if he were sworn according to the usual form of the Courts of *England*: but then it must be agreed that the credit of such testimony must be left to the jury." Upon this citation of Lord *Hale*, out of Covarruviam, I shall say once for all, that I do not lay

any great stress on the citations out of the civil law books; not only because I think the present case does not want them, but likewise because they only show that there are particular laws and edicts in other countries which determine this question there; and, therefore, they are not so applicable to the present case, since it is not pretended that there is any act of parliament which has settled this matter. This use indeed, and this only, can be made of these citations, to show that the opinion of the legislature in other countries has been for admitting this sort of evidence.

The last answer that I shall give to this assertion of Lord *Coke's*, as explained in *Calvin's Case*, are his own words in his 4th Inst. p. 155. "*Fœdus pacis or commercii*," saith he, "though not *mutui auxilii*, may be stricken between a Christian prince and infidel pagan; and as these leagues are to be established by oath, a question will arise whether the infidel or pagan prince may swear in this case by false gods, since he thereby offendeth the true God by giving worship to false gods. This doubt," saith he, "was moved by Publicola to St. Augustine, who thus resolveth the same: 'He that taketh the credit of him who sweareth by false gods not to any evil but good, he doth not join himself to that sin of swearing by devils, but is partaker with those lawful leagues, wherein the other keepeth his faith and oath: but if a Christian should anyways induce another to swear by them, he would grievously sin. But seeing that such deeds are warranted by the word of God, all incidents thereto are permitted.'" This is, I think, as inconsistent as possible with his notion that an infidel is not *fide dignus*, and a full answer to what he said in *Calvin's Case* on this head; and, therefore, I shall leave him here, having, I think, quite destroyed the authority of his general rule, that none but a Christian ought to be admitted as a witness.

I shall now proceed to explain the nature of an oath which will, I think, contribute very much towards the determination of the general, as well as the present question. If an oath were merely a Christian institution, as

baptism, the sacrament, and the like, I should be forced to admit that none but a Christian could take an oath. But oaths were instituted long before Christianity was made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. *Juramentum*, according to Lord *Coke* himself, *nihil aliud est quam Deum in testem vocare*; and, therefore, nothing but the belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take the oath. We read of them, therefore, in the most early times. If we look into the sacred history, we have an account in Genesis, c. 26. v. 28 and 31: and again Genesis, c. 31. v. 53, that the contracts between Isaac and Abimelech, and between Jacob and Laban, were confirmed by mutual oaths; and yet the contracting parties were of very different religions, and swore in a different form. It would be endless to cite the places in the Old Testament where mention is made of taking an oath upon solemn occasions, and how great a reverence was always paid to it. I shall only take notice of three: one in Numb. c. 30. v. 2, "He that sweareth an oath bindeth his soul with a bond;" another in Deut. c. 6. v. 13, "Thou shalt fear the Lord thy God, and swear by his name;" and another, Psalm 15. v. 4, where a righteous man is described in this manner, "One who sweareth unto his neighbour and disappointeth him not, though it were to his own hindrance."

From the passage of the New Testament, where mention is made of an oath, it is plain that it continued to be used in the same manner, and to be had in the same, if not greater veneration, after the coming of our Saviour. The nature of an oath was not at all altered, only as the promise of rewards and punishments in another world was then more clearly revealed, the obligation of an oath grew much stronger, and those who were really Christians were under a greater apprehension of breaking it. "An oath for confirmation," said St. Paul, "is an end of all strife." Heb. c. 6. v. 16. And I cannot forbear mentioning one passage more out of the New Testament, to show what

great reverence was paid to an oath, even by the most wicked men; and under what great apprehensions they were of breaking it. It is in Matt. c. 14. v. 6 to 9, and it is related in the same manner by St. Mark, c. 6. v. 23 to 26, that Herod having sworn to Herodias, that whatsoever she asked of him he would give it to her, though he was exceeding sorry when she asked of him the head of St. John the Baptist, yet for his oath's sake, and the sake of them who sate with him, he would not reject her. And I cannot help likewise, in this place, though a little out of course, taking notice of what is said by Lactantius on this subject, that some in his time, who were so very wicked as not to be afraid even of committing murder, yet had such a veneration for an oath, and such a dread of being foresworn, that when purged upon their oath, they durst not deny the fact.

If we look into profane authors, we shall find pretty much the same account of an oath. I shall mention only two or three of the most ancient and best of them. It appears in several places in Homer, that not only his heroes, but likewise his gods, whom he represents as gods of the second rank subject to one supreme being, frequently confirmed their promise or threats with an oath, and they were then looked upon as unalterable. In two places in Hesiod, the one in his book *De Generatione Deorum*, and the other in another book,* it is said that horrible misfortunes and punishments will befall those who swear falsely. So in the beginning of Pythagoras's *Golden Verses*, considering an oath as very sacred and as a sort of religious worship. And Hierocles, who is very large in his comment on this passage, says an oath was looked upon by the ancient fathers as one of the most solemn acts of religion. I shall conclude with Cicero, who never speaks of an oath but with the greatest reverence, and as the strongest tie which can be laid upon men. *Nullum vinculum* (says he) *ad astringendam fidem majores nostri arctius jurejurando crediderunt.*† To these great authorities I shall only beg leave to add the sentiments of two modern writers, but writers of very

* [Hesiod.
Theog. 231,
232. Op. et
Di. 804.]

† [Cic. de
Offic. Lib. 3,
c. 31.]

great credit; I mean Grotius *de Jure Belli et Pacis*, lib. 2. c. 13. s. 1. His words are, *Apud omnes populos et ab omni ævo circa pollicitationes promissa et contractus maxima semper vis fuit jurisjurandi*. And Tillotson's Sermons, vol. 1. p. 241, where he says that "It is the general practice of mankind, which has universally obtained in all ages and nations, to confirm things by an oath in order to the ending of differences."

It is very plain from what I have said that the substance of an oath has nothing to do with Christianity, only that by the Christian religion we are put still under great obligations not to be guilty of perjury; the forms, indeed, of an oath have been since varied, and have been always different in all countries according to the different laws, religion, and constitution of those countries. But still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say. Grotius in the same chapter, sect. 10, says, *forma jurisjurandi verbis differt, re convenit*. There are several very different forms of oaths mentioned in Selden, vol. ii. p. 1470, but whatever the forms are, he says, that is meant only to call God to witness to the truth of what is sworn; "*sit Deus testis*," "*sit Deus vindex*," or "*ita te Deus adjuvet*," are expressions promiscuously made use of in Christian countries; and in ours that oath hath been frequently varied, as "*ita te Deus adjuvet tactis sacrosanctis Dei Evangeliiis*;" "*ita, &c., et sacrosancta Dei Evangelia*;" "*ita, &c., et omnes sancti*." And now we keep only these words in the oath, "so help you God," and which indeed are the only material words, and which any heathen who believes a God may take as well as a Christian. The kissing the book here, and the touching the brahmin's hand and foot at *Calcutta*, and many other different forms which are made use of in different countries, are no part of the oath, but are only ceremonies invented to add the greater solemnity to the taking of it, and to express the assent of the party to the oath, when he does not repeat the oath itself: but the swearing in all of them, be the external form what it will, is calling God

Almighty to be a witness : as is clear from these words of our Saviour, in Matt. c. 23. v. 21 and 22, "Whoso sweareth by the temple sweareth by it, and by him that dwelleth therein; and he that sweareth by heaven, sweareth by the throne of God, and by him that sitteth thereon." As to what was said by the counsel, that Christianity is part of the law of *England*, which is certainly true, as it is here established by laws, and that, therefore, to admit the oath of a heathen is contrary to the law of *England*, it appears from what I have already laid down that there is nothing in that argument, since an oath is no more a part of Christianity than of every other religion in the world. There is likewise as little in another argument which was made use of, that an oath cannot be altered but by act of parliament; for the form of an assertory oath here hath been frequently varied, as I have already observed. And what Lord *Coke* says in the 2 Inst. 479, and 3 Inst. 165, that an oath cannot be altered, nor a new one imposed, but by authority of parliament, plainly relates only to promissory oaths, or oaths of office, as those of privy councillors, judges, sheriffs, and the like, and not at all to oaths taken by witnesses. As to the passage mentioned out of the State Trials, where the Lord Chief Justice asked if the witness were a Christian or not, who appeared to be otherwise by his mien and dress, and was going to take the common oath, and as to what was said that Lord Chief Justice *Eyre* once refused to swear a man on the Evangelists, who was not a Christian, and that Lord Chief Baron *Gilbert* did the same to one who, when asked whether he believed in Christ, declared that he did not know who Christ was, very little can be inferred from either of these instances, since it does not appear that the fact, to which the witness was going to be sworn, arose in a foreign country, or that it was a mercantile cause, or that it was ever insisted on by the counsel that the witness should be examined in any other manner than in the common form upon the Holy Evangelists.

Having now, I think, sufficiently shown that Lord *Coke's* rule is without foundation, either in scripture,

reason, or law, that I may not be understood in too general a sense, I shall repeat it over again, that I only give my opinion that such infidels who believe a God, and that He will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this, though a Christian country. And, on the other hand, I am clearly of opinion that such infidels, if any such there be, who either do not believe a God, or, if they do, do not think that He will either reward or punish them in this world or in the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. I therefore entirely disagree with what is reported to have been said by Lord Chief Justice *Ley*, in 2 Rol. Rep. 346, Tr. 21, Jam. 1, B. R., that in the trials of matters arising beyond sea we ought to allow such proof as they beyond sea would allow. This would be leaving this point on so very loose and uncertain a foot, that I cannot come into it; for if this rule were to hold, considering in what a strange manner justice is administered in some foreign parts, God knows what evidence must be admitted. Nor can I agree with the resolution in the case of *Alsop v. Bowtrell*, Cro. Jac. 541, 2 M. 17 J. 1, B. R., where it was holden that a certificate under the seal of the minister at Utrecht and of the said town, of the marriage of two persons there, and that they cohabited together as man and wife, was a sufficient proof. To admit the certificate of the minister of the fact of the marriage, at a place where there is no bishop, might perhaps be equal, and be resembled to the certificate of the bishop here, which is in some cases conclusive evidence of a marriage. But I am clearly of opinion that the certificate of their cohabiting together ought not to have been admitted. For our law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. Even the certificate of the king, under his sign manual, of a matter of fact (except in one old case in Chancery, Hob. 213), has been always refused; and it would be

strange if we should give greater credit to the certificate of a minister at Utrecht than to that of the king himself. Besides, it is not the best evidence that the nature of the thing will admit, but the proper and usual evidence of a fact, arising beyond sea, is an affidavit of deposition, taken before a public notary, and certified to be so, under the seal of the place, or the principal officer of the place, which has been admitted as evidence in some cases, where it would be too expensive, considering the nature of the cause, to take out a special commission. Before I conclude this head, I must beg leave again to take notice of what is said by Lord *Hale*, that it must be left to the jury what credit must be given to these infidel witnesses. For I do not think that the same credit ought to be given either by a court or a jury to an infidel witness as to a Christian, who is under much stronger obligations to swear nothing but the truth. The distinction between the competency and credit of a witness is a known distinction, and many witnesses are admitted as competent, to whose credit objections may be afterwards made. *The rule of evidence is, that the best evidence must be given that the nature of the thing will admit.* The best evidence which can be expected or required, according to the nature of the case, must be received; but if better evidence be offered on the other side, the other evidence, though admitted, may happen to be of no weight at all. To explain what I mean: suppose an examined copy of a record (as it certainly may) be given in evidence; if the other side afterwards produce the record itself, and it appears to be different from the copy, the authority of the copy is at an end. To come nearer to the present case: supposing an infidel, who believes a God, and that He will reward and punish him in this world, but does not believe a future state, be examined on his oath, as I think he may, and, on the other side, to contradict him, a Christian is examined, who believes a future state, and that he shall be punished in the next world as well as in this if he does not swear the truth, I think that the same credit ought not to be

given to an infidel as to a Christian, because he is plainly not under so strong an obligation.

I have now done with the general question. And what I have said upon that must plainly show of what opinion I am in respect to the present question ; and, therefore, I shall be very short as to that. I think, after what I have already said, I need say nothing more to determine this point than barely to state the facts relating to it, as they stand now before the court.

It is admitted that the cause is concerning a mercantile affair, which was transacted in a foreign heathen country, at *Calcutta*. It must be agreed that it is greatly to the advantage of this nation to carry on a trade and commerce in foreign countries, and in many countries inhabited by heathens, and particularly in this town, in which we have established a factory for that purpose. A trade was accordingly carried on there between the plaintiff, a heathen and subject of that country, and a Christian merchant, a subject of *England*. It is insisted by the plaintiff, that the *English* merchant, being greatly in his debt, withdrew into *England*, and consequently was not amenable to the courts of justice in that country, where, if he could have tried his cause, this evidence, which is now in dispute, would have certainly been admitted. He followed his debtor into *England*, which was the only remedy that he had left, and filed his bill against him in the Court of Chancery here. No one will, I believe, now say that he had not a right to bring such a suit, or that he is not entitled to justice. For, though there was such an old notion in popish times, and for some little time afterwards, till the Reformation was fully established, that even an alien friend, especially if he were an infidel, could not sue in a court of justice here, this most absurd, wicked, and unchristian notion has, God be thanked, been long since exploded, and will, I hope, never be revived again. It being admitted that he may bring his suit here, and consequently that he is entitled to justice, it follows that he must be at liberty to produce his evidence here, in order to make out his case. And if he produce his

evidence, it must be upon oath ; for it would be absurd to give an infidel more credit than a Christian, which we must do, if an infidel's evidence be necessary, in order to do justice, and yet he cannot be examined upon oath : he must, therefore, be examined upon oath in some shape or other. In order to obtain justice, the plaintiff in this cause laid his case properly before the Court of Chancery, and prayed a commission to *Calcutta* ; and the Court of Chancery, I think, very rightly, and with great justice, ordered a commission to go, and that the words "on the Holy Evangelists" should be omitted, and the word "solemnly" inserted in their room : and likewise very prudently directed that the commissioners should certify upon the return of the commission in what manner the oath was administered to the witnesses examined, on the commission ; and what religion they were of. The commissioners accordingly returned that the oath was administered to the witnesses in the same words as here in *England*, which fully answers the objection (if there was anything in it), that the form of the oath cannot be altered ; and they certified that after the oath was read and interpreted to them, they touched the brahmin's hand or foot, the same being the usual and most solemn manner in which oaths are administered to witnesses who profess the *Gentoo* religion, and in the same manner in which oaths are usually administered to persons who profess the *Gentoo* religion, on their examination as witnesses in the courts of justice, erected by virtue of his Majesty's letters patent at *Calcutta* ; and they further certified that the witnesses so examined were all of the *Gentoo* religion. This certificate, I think, fully answers the objection, that it does not appear that the witnesses believe a God, or that He will punish them if they swear falsely ; which, as I have already said, I admit to be requisite, absolutely necessary to qualify a person to take an oath. I do not at all rely upon the books which were cited, and which give an account of the *Gentoo* religion. But it is plain, from the certificate itself, that they believe and worship a God, and that they have priests for that purpose, which

would be of no use, if they did not believe that He would reward or punish them, according to their deserts. The certificate likewise answers this objection, that the oath being only read to the witnesses, it does not appear that they said or did anything which signified their assent to it; for touching the hand or foot of the priest, after these words, "so help me God," it being their usual form, is as much signifying their assent as kissing the book is here, where the party swearing likewise says nothing. And the case cited by the Lord Chief Baron, from 2 Sid. 6, Mich. 1657, plainly proves this, where Chief Justice *Glyn* was of opinion that Doctor Owen's holding up his right hand was sufficient, without touching the book. And Lord *Stair*, in his institutes of the Laws of Scotland, p. 692, confirms this, where he says, "It is the duty of judges, in taking the oaths of witnesses, to do it in those forms that will most touch the conscience of the swearers according to their persuasion and custom; and though Quakers and fanatics, deviating from the common sentiments of mankind, refuse to give a formal oath, yet, if they do that which is materially the same, it is materially an oath."

The only objection that remains against admitting this evidence is, that these witnesses will not be liable to be indicted for perjury; because they are not sworn *supra sacrosancta Dei Evangelia*, which words, as was insisted, are necessary in every such indictment; and, therefore, they are not under the same necessity to swear truly as Christian witnesses are. But this objection has been in a great measure already answered by the Chief Baron, and it may receive two plain answers; first, that these words, "*supra sacrosancta Dei Evangelia*," or "*tactis sacrosanctis Dei Evangeliiis*," are not necessary to be in an indictment for perjury. They have been omitted in many indictments against Jews, of which several precedents have been laid before us; and they are not in the precedents of such indictments, which I find in an ancient and very good book, entitled West's Simboleography; but it is only said there, "*supra sacramentum suum dixit et*

deposuit," or "*affirmavit et deposuit*." Besides: this argument, if it prove anything, proves a great deal too much; for, if there were anything in it, many depositions even of Christians have been admitted, and many more must be admitted, or else there will be a manifest failure of justice, where the witnesses are certainly not liable to be indicted: for when the depositions of witnesses are taken in another country, it frequently happens that they never come over hither, or if they do, cannot be indicted for perjury, because the fact was committed in another country. Those, therefore, who are plainly not liable to be indicted for perjury, have often been, and for the sake of justice must be admitted as witnesses, and so there is an end of the objection.

From what I have said it is plain that my opinion is that these depositions ought to be read in evidence.

THE rule of law upon this subject was anciently supposed to be, that *infidels*, *i. e.*, persons not professing the Christian faith, were incompetent as witnesses, Gilb. Ev. 142. The principal case has, however, settled the contrary; and it was ruled by Buller, J., in *R. v. Taylor*, Peake, 11, that the proper question to put to a witness, in order to ascertain his competency as to religious principle, is, *whether he believes in a God, the obligation of an oath, and a future state of rewards and punishments*. It would appear, however, from some of the observations of the Chief Justice in the principal case, that it is sufficient if the witness believe in a God who will reward or punish him *in this world*. [See *Maden v. Catanach*, 7 H. & N. 360; 31 L. J. Exch. 118, where the infidel was about to be sworn as a witness for the plaintiffs, and on the proposal of counsel to examine her as to religious belief, the judge swore her on the *voire dire*, and let her be so examined, and then refused to let her be examined as a witness. See also *Jackson v. Gridley*, 18 Johns. Amer. Rep. 98.] In *White's Case*, 1 Leech, 430, the witness stated that he had heard there was a God, and believed that people who told lies would come to the gallows, but was ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, and what became of wicked people after death. His testimony was rejected. In this case the wit-

ness seems to have had an idea that falsehood would be punished by God in this world, but not of the peculiar solemnity of an oath, and of the sinfulness of perjury beyond that of any other species of falsehood. Indeed it does not appear at all clearly from the report, that the witness believed the punishment of sin, even in this world, to be part of *God's* government, without which he did not fall within what was said by Willes, C. J., in the principal case. It has been held that where an infant witness in a criminal case appeared to have no notion of the obligation of an oath, the trial might be postponed till he should be instructed, 1 Leach, 430, n. But it was held differently where the witness was an adult, and of sufficient intellect, *Wade's Case*, 1 Moo. C. C. 86. Also, where the child was incompetent to take an oath, by reason of her tender years, and not from neglected education, Pollock, C. B., observing that "more would probably be lost in memory than would be gained in any other way." His lordship, however, expressly guarded himself against being supposed to lay down any general rule, as there might be cases where a postponement would be proper. [*R. v. Nicholas*, 2 C. & Kir. 246.]

Quakers and Moravians were formerly incompetent in criminal cases, but their disability is now removed by st. 9 Geo. 4, c. 15, s. 1, 3 & 4 W. 4, c. 49, 1 & 2 Vict. c. 77 :

as is that of Separatists by 3 & 4 W. 4, c. 82. And by the Common Law Procedure Act, 1854, [17 & 18 Vict. c. 125, extended to criminal proceedings by 24 & 25 Vict. c. 66, and to Scotland by 26 & 27 Vict. c. 85,] s. 20, "If any person called as a witness, or required or desired to make an affidavit or deposition, shall refuse, or be unwilling from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; *videlicet*,

'I, A. B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare, &c.'

Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form." ["These acts do not," as Mr. J. F. Stephen observes, in his excellent "General View of the Criminal Law of England," p. 289, "meet the case of a person who, being an atheist, has either no religious belief or does not object to taking an oath." See *Maden v. Catanach*, *suprd*, where the

atheist did not object to being sworn. In lieu of the oaths of allegiance, supremacy, and abjuration, one new form of oath has been substituted by the 21 & 22 Vict. c. 48, s. 1; and a form of affirmation, for Quakers and persons permitted to make an affirmation or declaration instead of an oath, has been provided by the 22 Vict. c. 10, s. 1.] Excommunicated persons were also incapable of giving evidence at common law, but are now, by stat. 53 G. 3. c. 127, s. 3, exempted from all civil disabilities. And this seems equally applicable to excommunication *ipso facto*, as to that pronounced by an ecclesiastical court, *Escott v. Martin*, 4 Moo. P. C. C. 104. Lord Denman's Act, 6 & 7 Vict. c. 85, removes the effect of incapacity from crime; but it has been made a question whether its provisions extend to the courts Christian. *Sanders v. Wigston*, 1 Robert. 460.

With respect to the principal case, the following account of the determination of the Chancellor upon it is extracted from 1 Wilson, 84. "It was held by the Lord Chancellor that an infidel, pagan, idolater, may be a witness, and that his deposition, sworn according to the custom and manner of the country where he lives, may be read in evidence." See *Reg. v. Entremahn*, 1 Car. & M. 248; 1 & 2 Vict. c. 105.

Notwithstanding the doctrine of

the principal case, it was held by the Court of Exchequer, in the great case of *Miller v. Salomons*, 7 Exch. 475, (Martin, B., *dissentiente*,) that the words, "upon the true faith of a Christian," are not a mere form of swearing, but an essential part of the oath of abjuration required by 6 Geo. 3, c. 53, so that, by the indirect and unintentional effect of those words, her majesty's Jewish subjects, though they might lawfully be elected members of parliament, could not sit and vote; and that judgment was affirmed in the Exchequer Chamber, 8 Exch. 778. The case [was taken up to] the House of Lords; [but was not argued there. Yearly, from 1848 until 1858, bills to enable Jews to sit in parliament were sent up by the House of Commons to the House of Lords, and were there thrown out; at last, in 1858, two statutes were passed, first, the 21 & 22 Vict. c. 48, by which a new form of oath was substituted for the oaths of abjuration, supremacy, and allegiance, which form retains the words, "upon the true faith of a Christian;" and, secondly, the 21 & 22 Vict. c. 49 (amended by the 23 & 24 Vict. c. 63), by which either House of Parliament was enabled to admit by resolution any qualified Jew to sit and vote after taking the oath in its new form, but without the words, "upon the true faith of a Christian." A resolution to this effect was come to in the House of

Commons in the same session, and Mr. Salomons, the defendant in *Miller v. Salomons* (being a Jew), and others of the same faith, were afterwards admitted to sit and vote as members of that House. And if the Queen should think proper to raise a Jew to the Peer- age, there seems no reason to doubt that the House of Lords would think it to be their duty to make a similar resolution, if not from conviction, at least in loyal acknowledgment of the undoubted prerogative of the Crown as the fountain of honour.]

SCOTT v. SHEPHERD

EASTER, 13 GEO. 3.—C. P. ; 3 Wils. 403, S.C.

[REPORTED 2 BLACKSTONE, 892.]

Trespass and assault will lie for originally throwing a squib, which, after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye.

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes at Bridgwater, when the jury found a verdict for the plaintiff with 100*l.* damages, subject to the opinion of the court on this case:—On the evening of the fair-day at Milborne Port, 28th October, 1770, the defendant threw a *lighted squib*, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it *across* the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing,

and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. *Qu.* If this action be maintainable?

This case was argued last Term by *Glyn*, for the plaintiff, and *Burland*, for the defendant: and this Term, the Court, being divided in their judgment, delivered their opinions *seriatim*.

NARES, J.

Nares, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute W. 3. been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate: 11 Hen. 7, 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596. Hob. 134. T. Jones, 205. 6 Edw. 4, 7, 8. Fitzh. *Trespass*, 110. The principle I go upon is what is laid down in *Reynolds v. Clarke*, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. 4, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. 8, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60. Reg. 108, 95. 6 Ed. 4, 7, 8. 1 Ld. Raym. 272. Hob. 180. Cro. Jac. 122, 43. F. N. B. 202, 91 g. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. *Qui facit per aliud facit per se*. He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever

mischief he may do. The intermediate acts of Willis and Nares, J. Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the *King v. Huggins*, 2 Lord Raym. 1574. *Parkhurst v. Foster*, 1 Lord Raym. 480. *Rosewell v. Prior*, 12 Mod. 639. And it was declared by this court, in *Slater v. Baker*, M. 8 Geo. 3, 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

Blackstone, J., was of opinion that an action of *trespass* Blackstone, J. did not lie for *Scott* against *Shepherd*, upon this case. He took the settled distinction to be, that where the injury is *immediate*, an action of *trespass* will lie; where it is only *consequential*, it must be an action on the case: *Reynolds v. Clarke*, Lord Raym. 1401, Stra. 634; *Haward v. Bankes*, Burr. 1114; *Harker v. Birbeck*, Burr. 1159. The *lawfulness* or *unlawfulness* of the original act is not the criterion; though something of that sort is put into Lord *Raymond's* mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, *trespass* might have lain; but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over, and is hurt, an action on the case only lies, it being a *consequential* damage; but if in throwing it I hit another man, he may bring *trespass*, because it is an *immediate* wrong. *Trespass* may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground, and I go thereon to fetch it, *trespass* lies. This is the case cited from 6 Edw. 4; 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my

BLACKSTONE, J. recognizance thereby, I shall have an action on the case ; *per* Powel, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that *lawful* or *unlawful* is quite out of the case ; the solid distinction is between *direct* or *immediate* injuries on the one hand, and *mediate* or *consequential* on the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was *immediate* or *consequential* only ; and I hold it to be the latter. The original act was, as against Yates, a trespass ; not as against Ryal or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to en-damage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal ; who both were free agents, and acted upon their own judgment. This differs from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree ; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new *impetus* and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act ; nay, it may be extended

in infinitum. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's window, shall he have *trespass* against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether *case* would lie against Shepherd for the *consequential* damage; though, as at present advised, I think, upon the circumstances it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person;—nothing but *inevitable necessity*; *Weaver v. Ward*, Hob. 134; *Dickenson v. Watson*, T. Jones, 205; *Gilbert v. Stone*, Al. 35, Styl. 72. So in the case put by *Bryan, J.*; and assented to by *Littleton* and *Cheke, C. J.*, and relied on in Raym. 467, "If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself." But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act.—ut what is his own immediate act? The throwing the squib to Yates's stall. Had

BLACKSTONE, J. Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of Shepherd, nor the inevitable effect of it ; much less the subsequent throwing by Ryal. *Slater v. Barker* was first a motion for a new trial *after verdict*. In our case the verdict is suspended till the determination of the court. And although *after verdict* the court will not look with eagle's eyes to spy out a variance, yet when a question is put by the jury upon such a variance, and it is made the very point of the cause, the court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain *trespass*, may also frequently maintain *case*, but not *e converso*. *Every action of trespass with a "per quod" includes an action on the case. I may bring trespass for the immediate injury, and subjoin a "per quod" for the consequential damages ;—or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited.* But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant ; *Gates and Bailey*, Tr. 6 Geo. 3, 2 Wils. 313. It is said by Lord *Raymond*, and very justly in *Reynolds v. Clarke*, "we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained), I am of opinion that in this action judgment ought to be for the defendant.

GOULD, J.

Gould, J., was of the same opinion with *Nares, J.*, that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of

the remedy. The line is very nice between *case* and *tres-* GOULD, J.
pass upon these occasions: I am persuaded there are many instances wherein both or either will lie. I agree with Brother *Nares*, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequences be in nature of trespass. But exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers: 1, from the general mischievous intent; 2, from the obvious and natural consequences of such an act; which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land: Hardr. 69; *Courtney v. Collett*, 1 Lord Raym. 272. I shall not go over again the ground which Brother *Nares* has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

De Grey, C. J.—This case is one of those wherein the DE GREY, C. J.
 line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my brother *Blackstone* as

DE GREY, C.J. to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c.—They may also not lie for the consequences even of illegal acts, as that of casting a log on the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant*, and I am of opinion that in this case it is. The throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it; *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows: if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter; Fost. 261. So too, in 1 Ventr. 295, a person breaking a horse in Lincoln's-Inn-Fields hurt a man; held, that trespass lay: and 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95, a, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act needs not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make

* [See *Fletcher v. Rylands*, 34 L. J. Exch. 177.]

a difference: but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers *Gould* and *Nares* that the present action is maintainable.

Postea to the plaintiff.

THE importance of the principal case has been considerably diminished, by the alteration introduced into the law by the Common Law Procedure Amendment Act, 1852, which abolished special demurrers, allowed of joinder of different forms of action, and gave large powers of amendment, so that a blunder in the form of the remedy cannot in any case affect the ultimate success of the cause. There is, however, much both in the principal case and in the notes that is still worthy of study; and even the distinction, often subtle and refined, sometimes invisible, between trespass and case serves in many instances as a test of substantial liability; for example, the modern case of *Sharrod v. London and South Western Rail. Co.*, 4 Exch. 580, which, for want of being properly understood, has met with some animadversion, in which a railway company was sued in an action of trespass for an injury to cattle which had strayed upon the railway, by a train passing along the line, and held not to be liable in that form of action. A moment's reflection will suggest that if the company could be so sued, all questions of duty to fence, careful driving, &c., upon which the liability of the company ought to depend, would be excluded by the nature of the inquiry called for by the plaintiff; and the case involves the substantive decision that a railway company is not liable for injury to cattle straying upon the line, unless it is alleged and proved that such injury was occasioned by its own or its servants' wrongful or negligent act. [See also *Fletcher v. Rylands*, 34 L. J. Exch. 177. In *Brandt v. Craddock*, 27 L. J. Exch. 314, the declaration was for arresting and imprisoning the plaintiff without reasonable or probable cause, on a false and malicious charge of felony. The judge at the trial treated this as a count in case for a malicious prosecution, and nonsuited the plaintiff, because there was reasonable and probable cause for the arrest and imprisonment, but the nonsuit was afterwards set aside by the court, on the ground that the cause of action was a trespass;

and see *Chivers v. Savage*, 5 E. & B. 697.] And similar considerations may be important in determining whether a cause of action, the damage resulting from which is not apparent at the time, be barred by the Statute of Limitations. See [*Backhouse v. Bonomi*, 9 H. of L. Ca., overruling some important dicta in] *Nicklin v. Williams*, 10 Exch. 259; [and *Whitehouse v. Fellowes*, 10 C. B. 765]. The case of *Scott v. Shepherd*, and the following note, are therefore retained in this edition.

It is perfectly clear that if an injury be done to A. by the immediate force of B., the former may bring trespass; and it is equally clear that if the injury be not immediate, but merely consequential, he cannot sue in trespass; and that his remedy, if any, is by action on the case for consequential damages; these two propositions are well illustrated by the case put in the text of a man throwing a log into the highway. If the log strike A. in its fall, he may sue in trespass; but if, after it is lodged, and rests upon the ground, he stumble over it, and so receive an injury, case is his only remedy. See Com. Di. Pleader, *Action on the case* (A.), *ibid.* (B. 6); *Leame v. Bray*, 3 East. 593; *Covell v. Laming*, 1 Camp. 697; *Chandler v. Broughton*, 1 C. & M. 29; 3 Tyrwh. 220; *Hartley v. Monham*, 3 Q. B. 701; *West v. Nibbs*, 4 C. B. 172, where a mere detainer of goods (by locking them

up and refusing access to them) was held to be no trespass. But the continuance of a trespass, though without fresh violence, is a new trespass; thus, in the case above put, if the log were thrown upon A.'s land, so as to be a trespass to the realty, he might, after having recovered damages in trespass for placing it there, sue in trespass again for its continuance. *Holmes v. Wilson*, 10 A. & E. 503; *Thompson v. Gibson*, 7 M. & W. 456; [see *Whitehouse v. Fellowes*, *ubi supra*.] For there is a legal obligation upon the wrongdoer to discontinue a trespass or remove a nuisance: though there is no such obligation upon a trespasser to replace what he has destroyed, albeit he is liable in one action of trespass to compensate in damages the loss which he has occasioned. *Clegg v. Dearden*, 12 Q. B. 576.

However, although trespass lies wherever the injury done to the plaintiff results from the immediate force of the defendant, still there are many instances in which the plaintiff, though he may adopt that form of action, is not bound to do so, but may sue in case. In *Moreton v. Hardern*, 4 B. & C. 224, the declaration stated that the defendants drove their coach so negligently and carelessly that the wheel ran with great force against the plaintiff, whereby one of his legs was broken. It was proved that one of the defendants was personally driving when the

accident occurred ; and it was thereupon urged that the action should have been *trespass not case*. The court, however, decided that case would lie, and Bayley, J., gave the following historical account of the progress of the law upon this subject.

"It was long," said his lordship, "*voxata quæstio*, whether case could be brought when the defendant was personally present, and acting in that which occasioned the mischief. Early in my professional experience, case was the form of action usually adopted for such injuries. In Lord Kenyon's time a doubt was raised upon the point, and he thought that, where the act was immediately injurious, trespass was the only action that could be maintained for that injury. *Leame v. Bray* was an action of trespass. On the trial, Lord Ellenborough thought it should have been case, but on further consideration this court was of opinion that trespass was maintainable, but they did not decide that an action on the case would have been improper. Looking at the other cases on the subject, it is difficult to say that an action on the case will not lie for an injury sustained by the negligent driving of a coach, though one of the proprietors was the person guilty of that negligence. In *Ogle v. Barnes*, 8 T. R. 188, which was an action for negligently steering a ship, the declaration alleged that the ship was

under the care of Barnes, one of the defendants, and of certain servants of the defendants, and that through their negligence the injury was sustained ; and it was never urged that the action should have been trespass and not case, because one of the defendants was on board, but on the ground of the injury being immediate. In *Rogers v. Imbledon*, 2 N. R. 117, which was decided after *Leame v. Bray*, it was alleged that the defendant was driving a cart, and took such bad care of the cart and horse, that it ran with great force against the plaintiff's horse. To that there was a demurrer upon the authority of *Leame v. Bray*, the action being in case ; but the court was clearly of opinion that case would lie and the demurrer was overruled. In *Huggett v. Montgomery*, 2 N. R. 446, although the defendant was on board, yet the ship was not under his immediate care and management, but under that of a pilot ; and on that ground case was held to be the proper form of action. It is not necessary to say that trespass could not, in this case, have been sustained against Hardern ; no doubt that action lies where an injury is inflicted by the wilful act of the defendant ; but there is no doubt that case also lies where the act is negligent, and not wilful."

This judgment has been cited at some length, because it contains a complete history of the

progress of the law up to the decision in *Moreton v. Hardern*. The right of the plaintiff to bring case, where the act for which he sues, although committed with immediate force, is negligent, not wilful, is fully established in *Williams v. Holland*, 10 Bing. 113, where all the previous cases having any bearing on the subject, will be found collected in the argument of Jones, Serjeant. The declaration charged that the defendant so carelessly, unskilfully, and improperly drove his gig, that through the carelessness, negligence, unskilfulness, and improper conduct of the defendant, the said gig struck with great violence against the cart and horse of the plaintiff. The jury having found a verdict of guilty on the ground of negligence, it was objected that the action should have been trespass, not case; but the Court of Common Pleas were of opinion that *Moreton v. Hardern* had "laid down a plain, intelligible rule, that where the injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act." See also *Wheatley v. Patrick*, 2 M. & W. 651; and there are other instances in which the plaintiff has his choice of case and trespass, as where one man builds his house overhanging that of another, so that the rain falls on it, *Wells v.*

Ody, judgment of Parke, B., 1 M. & W. 462; *Raine v. Alderson*, 4 Bing. N. C. 702; *Fay v. Prentice*, 1 C. B. 828; [*McMahon v. Leonard*, 6 H. of Lords' Cases, 970.] It is, however, clear, from *Leame v. Bray*, and *Chandler v. Broughton*, 1 Cr. & Mee. 29, 3 Tyrwh. 220, that the plaintiff may, if he please, bring trespass, whenever the injury is immediate, even though it be not wilful; and it is equally clear that, where the injury, *which forms the gist of the action*, is both wilful and immediate, trespass is the only remedy. *Savignac v. Roome*, 6 T. R. 125; *Day v. Edwards*, 5 T. R. 648; *Weeton v. Woodcock*, 7 Dowl. 853; 5 M. & W. 758, S. C. The words "*which forms the gist of the action*" are printed in italics, because it is apprehended that the proposition laid down by Blackstone, J., in the text, p. 422, is correct, *viz.*, that wherever a trespass occasions consequential damage, the trespass itself may be waived, and case brought for the consequential damage. See *Wells v. Ody*, 5 Dowl. 95; *Raine v. Alderson*, 4 Bing. N. C. 702; *Chamberlain v. Hazlewood*, 5 M. & W. 515. See, however, the judgment of Parke, B., in *Weeton v. Woodcock*, 7 Dowl. 857; 5 M. & W. 587, S. C. In Comyns's Digest, *Action on the Case*, (B. 6), the distinction is clearly stated as follows, *viz.*, "So it (i. e. *case*) does not lie for a mere *trespass*, as for taking down the walls and pulling

down the tiles from a house, *unless it be alleged that the timber was thereby rotted*, 1 Roll. 104."

Before the Common Law Procedure Amendment Act, 1852, where the plaintiff elected to sue in case for an immediate but negligent act of violence, he was obliged to pay much attention to the wording of his declaration, and take care to introduce no expressions which imported an exertion of wilful force. In *Day v. Edwards*, 5 T. R. 648, a declaration in case alleged that the defendant "so *furiously*, negligently, and improperly drove his cart and horse, that through the *furious*, negligent, and improper conduct of the defendant, the cart and horse were driven against the plaintiff's carriage." This was held bad on special demurrer, and was distinguished from *Williams v. Holland*, by Tindal, C. J., on the ground that the declaration imported wilful violence, 10 Bing. 116; and there was sometimes a good deal of difficulty in determining whether a count was in case or trespass. See *Hemsworth v. Fowkes*, 4 B. & Ad. 461; *Smith v. Goodwin*, *ibid.* 413; *Holland v. Bird*, 10 Bing. 15; *Hudson v. Nicholson*, 5 M. & W. 437; *Holford v. Bailey*, 8 Q. B. 1000; 13 Q. B. 426, S. C. in error. Since the above act, however, except the count be so framed as to embarrass the defendant, in which case it may be amended or struck out under s. 52, the court would be

bound to uphold it if it stated in any form facts constituting a cause of action.

There are other instances in which trespass and case lie concurrently. Where goods are tortiously taken out of the plaintiff's possession, *trover*, which is a form of action on the case, may be maintained for the *conversion*, which, and not the tortious *taking*, is then *the gist of the action*; and "if trover will lie, which is only a subdivision of action on the case, why should not *case* also in its more expanded form?" per Tindal, C. J., in *Holland v. Bird*, 10 Bing. 18. In that case the form of the count was, that the defendant having distrained the plaintiff's goods for rent, the plaintiff tendered the rent in arrear and the cost of the distress, which the defendant ought to have accepted and re-delivered plaintiff's goods, but wrongfully refused so to do: this was held the proper subject of an action on the case. See on the same point, *Branscombe v. Bridges*, 1 B. & C. 145; *Smith v. Goodwin*, 4 B. & Ad. 413; *West v. Nibbs*, 4 C. B. 172. And a wrongful seizure under a second distress was made the subject of an action on the case in *Lear v. Caldecott*, 4 Q. B. 123; *Dawson v. Cropp*, 1 C. B. 961. [See *Lee v. Cooke*, 3 H. & N. 202; 27 L. J. Exch. 337, Cam. Scac.]

Another class of cases, and certainly rather an anomalous one, comprehends actions for seduc-

tion ; for which injury trespass and case are held to lie concurrently. See 2 T. R. 167, 6 East, 388. [Actions for *crim. con.* used to fall within this class, but have been transferred to the Probate Court in a modified form by 20 & 21 Vict. c. 85, see s. 59.] In *Woodward v. Walton*, 2 New Rep. 476, the declaration contained two counts ; the first stating that the defendant broke and entered the plaintiff's house, and there assaulted and debauched his daughter ; the second omitted the breaking and entering the dwelling-house, but stated that the defendant assaulted and debauched his daughter, *per quod servitium amisit*. On a motion to arrest judgment the question was learnedly argued, and the previous authorities on both sides cited ; and the court, after consideration, were of opinion that the action was rightly brought. "In actions like the present," said Sir J. Mansfield, C. J., delivering judgment, "as far as my recollection goes, the form of the declaration has always been in trespass, *vi et armis et contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so too. In the action for criminal conversation the violence is not the ground of the action : both in that case and this, if the injury were committed with violence, it would amount to a rape.

I therefore do not see any good reason why either of them should be the subject of an action of trespass. In actions by a master for an assault on his servant, *per quod servitium amisit*, there is no trespass against the plaintiff ; the sole foundation of the action is the loss of service. Yet this also has been considered as an action of trespass. All these cases are the same in principle, and fall within the same rule." His lordship then cited and commented upon several of the authorities, and concluded by stating himself perfectly satisfied that the injury complained of was the subject of an action of trespass, *accord*. *Ditcham v. Bond*, 2 M. & S. 436 ; where *Woodward v. Walton* was recognised, and acted upon ; and on the same principle proceeded the case of a nun at Common Law, for whose abduction from her cloister an action of trespass lay by her prioress ; for Lord Coke informs us, 2 Inst. 437, that where a monk was carried out of his cloister, the Register had provided a writ *de apostatâ capiendo*. "But (he continues) that writ doth not lie for a nun, and therefore the common law did give an action of trespass for taking her away," and he says that the stat. of West. 2, c. 34 : "*Qui monialem a domo sua abducit licet monialis consentiat*," &c., was for further punishment only, 2 Inst. 436. It is clear, however, that for seduction case may be maintained as well as

trespass, *Chamberlain v. Hazlewood*, 5 M. & W. 515, and the same in other cases where the injury is occasioned by an immediate act done to the servant; but where it is of such a character that the remedy of the servant would be by action on the case, so likewise is that of the master, *Martinez v. Gerber*, 3 M. & Gr. 88; 3 Sc. N. R. 386, S. C.

One class of cases, illustrative of the distinction between *case* and *trespass*, consists of those in which the subject-matter of complaint is an *arrest*. If one man maliciously, and without probable cause, procure another to be arrested either by civil or criminal process, that is the subject-matter of an action on the case, for the tort consists not in any immediate violence to the plaintiff's person, but in communicating an improper direction to the process of the law, *Elsee v. Smith*, 1 D. & R. 97; *Brown v. Chapman*, 6 C. P. 365. See *Farley v. Danks*, 4 Q. B. 493; [and *Wyatt v. White*, 5 H. & N. 371;] and it is held that trespass will not lie against a man who merely states his case to a court of justice, in consequence of which it issues void process, *Carratt v. Morley*, 1 Q. B. 19; and this however urgent he may be, as though he say he will take the process at his peril or the like and even prepare it, provided he take no part in executing it, *Cooper v. Harding*, 7 Q. B. 99; [see *Croushaw v. Chapman*, 31 L. J. Exch. 277;]

but if the defendant, without having recourse to legal process, make the arrest, or assist in making it, of his own authority, or direct a constable to make it, the remedy is *trespass*, for in that case he commits an unwarranted act of violence. *Stonehouse v. Elliott*, 6 T. R. 315; *West v. Smallwood*, 3 M. & W. 418; *Green v. Elgie*, 5 Q. B. 99; [*Harris v. Duignan*, 1 F. & F. 688; and see *Grinham v. Willey*, 4 H. & N. 496;] and so it is if he come armed with *void* process, for that is as none, *Parsons v. Lloyd*, 3 Wils. 341; *Carratt v. Morley*, 1 Q. B. 19; [*Brooks v. Hodgkinson*, 4 H. & N. 712; 29 L. J. Exch. 93, S. C.; *Eggington v. Mayor of Litchfield*, 5 E. & B. 100;] see *Bates v. Pilling*, 6 B. & C. 38; as, for instance, if it describe the defendant by a name by which he is not known, *Finch v. Cocken*, 5 Tyrwh. 775; 2 C. M. & R. 196, S. C.; *Hoye v. Bush*, 2 Scott, N. R. 86; though it is otherwise if the process be merely irregular, for then it stands good until set aside, *Riddell v. Pakeman*, 5 Tyrwh. 721. But when set aside it is as none; see *Collins v. Beaumont*, 10 Ad. & E. 225; and in *Codrington v. Lloyd*, 8 Ad. & E. 449, [and *Collett v. Foster*, 2 H. & N. 356,] the fact that it had been set aside was replied; the attorney in such a case is liable as well as the plaintiff [*Codrington v. Lloyd*; and the plaintiff may be liable for the arrest though

effected by his attorney without his express authority, *Collett v. Foster*, dubitante Bramwell, B.] It is necessary, however, to show in such a replication, that the writ was set aside for breach of faith or irregularity, because if it were set aside only for ground of error, no action would lie even against the party or his attorney; *Prentice v. Harrison*, 4 Q. B. 852; [see *Collett v. Foster*;] and as to the mode of pleading, *Rankin v. De Medina*, 1 C. B. 183; *Brown v. Jones*, 15 M. & W. 191. See, however, what was said by Lord Abinger, C. B., in *Smith v. Attwood*, 3 You. & Col. 129. And process set aside for irregularity will still protect the officer; as will likewise process founded on a judgment which is void for want of jurisdiction of which he has had no notice, *Andrews v. Marris*, 1 Q. B. 1. Yet, even the officer is not protected where he has notice of the defect of jurisdiction, *Watson v. Bodell*, 14 M. & W. 57. [Where an act expressly prohibited the arrest, the execution creditor was held liable without the writ of ca. sa. being set aside, *Brooks v. Hodgkinson supra*; and see *Renwick v. Dale*, Exch. 21 January, 1863. As to the remedy over by the sheriff against the plaintiff, when acting upon erroneous information given to him by the plaintiff he has taken the wrong person or wrong person's goods in execution, and that person has obtained judgment

against him for having so done, see *Childers v. Wooler*, 2 E. & E. 287; S.C., 29 L. J., Q. B., 129, where the action was not maintained.]

Upon a similar principle to that which governs the cases mentioned above, it is held that trespass will not lie for suing out execution and arresting thereon a man discharged by an insolvent debtor's act, *Ewart v. Jones*, 14 M. & W. 774; *Yearsley v. Heane*, 14 M. & W. 322; and in such a case [or when the discharge is under the Bankrupt Law Consolidation Act, 12 & 13 Vict. 106], there is, it seems, no remedy, unless the arrest be made maliciously, *and* without reasonable or probable cause. [See *Philips v. Naylor*, 3 H. & N. 14.] The same law seems applicable to the arrest of a person who has some personal privilege; see *Magray v. Burt*, 5 Q. B. 381; whilst, on the other hand, for the continuance of an imprisonment after it has ceased to be legal, trespass is the appropriate, when under the circumstances there is any, remedy, *ibid*, [and see *Dunston v. Paterson*, 2 C. B. N. S. 495, where Sarah Dunston sued the sheriff in trespass for false imprisonment, and he pleaded that he imprisoned her in consequence of her having represented that she was *Emily* Dunston, whom by a ca. sa. he was directed to take. She new assigned that he kept her in custody after she had given him notice that she was not Sarah

Dunston, and on demurrer judgment was given for her.]

In *Briant v. Clutton*, 5 Dowl. 66, it was held that if defendant imprison plaintiff by the process of a superior court, and plaintiff bring trespass, he will make out a *prima facie* case by showing the imprisonment in consequence of defendant's act; and defendant, to discharge himself, must plead specially, *S. P. Sowell v. Champion*, 6 Ad. & E. 316, *per curiam*. See *Randle v. Little*, 6 Q. B. 17; and where it was the *regular course of proceeding* of an inferior court, for the judge on a verdict being found to issue execution, the fact of a plaintiff bringing his plaint in that court and not countermanding the execution, was considered sufficient evidence of authority for executing it, to render him *prima facie* liable in trespass for a levy *regularly* made, so as to throw upon him the onus of justifying under the process of the court if he could. *Coomer v. Latham*, 16 M. & W. 713. But the necessity of pleading specially only exists where the judgment has been legally proceeded on, so as to justify the act done by the officer; for where the attorney's defence is that he sued out a legal writ on a legal judgment, and that the sheriff *of his own wrong* executed it illegally, that is a defence under *not guilty*. *Sowell v. Champion*, *ubi supra*.

[It is now settled that a corporation may be liable in *trespass*,

for instance for a false imprisonment, *Gough v. The Great Northern Rail. Co.*, Q. B., 13th February, 1861, 30 L. J. 148; and in case for a malicious injury, *Green v. The London General Omnibus Co.*, 7 C. B. N. S. 290, for instance, a libel. Generally a master is answerable for a *trespass* which his servant acting within the scope of his ordinary employment has committed, although no express authority or order to do the particular act, or do it in such way as rendered it a trespass, was given. Thus, if a railway servant whose duty it is to arrest any passenger who has not paid his fare, apprehends on that ground a person who turns out to have paid his fare, the company is liable in trespass for the injury, *Gough v. The Great Northern Rail. Co.*, *supra*; and if the conductor of an omnibus removes a drunk and disorderly passenger from it with unnecessary violence, the proprietor is liable in trespass for such violence, *Seymour v. Greenwood*, 6 H. & N. 359; 30 L. J. Exch. 89; affirmed in error, 7 H. & N. 355; 30 L. J. Exch. 327. The criterion of the liability of the master in such cases appears to be whether the injury resulted from an act done by the servant in the course of his service and for his master's purposes, *Limpus v. The London General Omnibus Co.*, 1 H. & C. 526. "If a servant driving a carriage, in order to effect some purpose of his own,"

wantonly strike the horses of another person and produce the accident, the master will not be liable," *Croft v. Alison*, 4 B. & A. 592, *per cur.*]

Before the Common Law Procedure Act, 1852, when a count in *trespass* was improperly substituted for one in *case*, or *vice versa*, or when trespass and case were misjoined, the mistake might be taken advantage of on general demurrer, or in many cases, motion in arrest of judgment, or writ of error. *Savignac v. Roome*, 6 T. R. 125; see Cowp. 407; 1 B. & P. 476; *Weeton v. Woodcock*, 7 Dowl. 853; *Holford v. Bailey*, 8 Q. B. 1000 (reversed upon another point), 13 Q. B. 426. Where, however, a count commenced with the statement of a writ in

case, and contained a complaint which was the subject-matter of an action of trespass, it was held good after verdict; *Hudson v. Nicholson*, 5 M. & W. 437; see *Brown v. Boorman*, 11 Cl. & F. 1. Questions of the latter kind cannot be said to have been utterly extirpated by the Common Law Procedure Amendment Act, 1852, that act not having carried into complete effect the abolition of forms of action recommended by the Commissioners in their First Report (page 34); and the study of those forms therefore cannot be altogether omitted. Such points, however, now only arise in discussions as to amendment and costs, and no longer go to the root of the proceedings.

COOPER v. CHITTY.

HILARY, 27 GEO. 2.—IN THE KINGS BENCH.

[REPORTED 1 BURR. 20.]

The title of a bankrupt's assignees relates back to the act of bankruptcy; and the sheriff who has seized the goods of a bankrupt after the act of bankruptcy, but before commission, and sold them after the commission and assignment, is liable to the assignees in trover.

THIS cause was twice argued: it came first before the court on Monday, the 9th of June, 1755; and again upon Tuesday, the 16th instant. It was an action of trover, brought by the assignees of William Johns, a bankrupt against the sheriffs of *London*, who had taken and sold the goods of Johns, in execution under a *fieri facias*, which had issued against Johns, at the suit of one William Godfrey.

Tuesday, 23rd
November,
1756.

Declaration.

On the trial a special case was settled:

Which case states, that Johns was regularly declared a bankrupt on the 8th of December, 1753. And as to the rest, the following times and facts were stated; *viz.*, that on the 5th of December, 1753, one Godfrey obtained judgment in the Common Pleas against the said Johns; and on the same day (5th December, 1753) execution upon the said judgment was taken out against him by Godfrey, and the goods seized by the sheriffs, under it; that Johns committed the act of bankruptcy on the 4th of December, 1753, and on the 8th of the same December a commission of bankruptcy was taken out against him; and, on the very same day, the commissioners of bank-

Facts.

* [See now 12 & 13 Vict. c. 106.]

† [With knowledge that the bankruptcy had taken place, see *post*, 453.]

Point.

Argument for the plaintiffs.

First question.

ruptcy executed an assignment;* and afterwards, *viz.*, on the 28th of December, a bill of sale of the goods was made by the sheriffs. The plaintiffs are the assignees under the commission: the defendants are the sheriffs of *London*, who seized the goods under the execution.†

The point was, whether the assignees under the commission of bankruptcy can maintain an action of trover against the sheriffs, who executed this process under a regular judgment and execution, for seizing the goods, under a *fiery facias*, issued and executed after the act of bankruptcy was committed; and selling them after the assignment was executed.

The counsel who argued for the plaintiffs made two questions, *viz.*:

1st. Whose property the goods were, when seized by the sheriffs, by virtue of this *fiery facias*.

2ndly. Whose property they were, when sold by the sheriffs.

1st Question. After the act of bankruptcy they ceased to be the property of the bankrupt himself, they said; wheresoever else the property might be, between the act of bankruptcy and the assignment.

This relation to the act of bankruptcy is like that of administrations to the time of the death; and they cited *Kiggil v. Player*, 1 Salk. 111, as S. P. with the present case, exactly.

The utmost that the bankrupt himself could be pretended to have was a special property, defeasible by the assignment. It is like the case of a distress for rent; where the seisor may sell the distress, after five days; but if the money be paid within the five days, he cannot sell: so that, in the interim, the right is defeasible.

Here, the plaintiffs have declared as assignees under the commission of bankruptcy: therefore their interest vests as from the time of the act of bankruptcy.

If the bankrupt himself had delivered the goods to a stranger, it had been the same thing: the stranger would be answerable to the assignees.

Sheriffs execute process at their peril: they are answer-

able *civiliter* for what they do upon it. 11 H. 4. 90, 14 H. 4, 25. Argument for the plaintiffs.

A man may, without his own fault, be possessed of a horse which has been stolen: but nevertheless he is answerable, *civiliter*, to the true owner for it.

The sheriff had no authority to take any goods in execution but the goods of the defendant: if he does take any other goods, he is a trespasser.

In writs of execution, it is at their peril if they take another man's goods. In *Carthew*, 381, *Hallet v. Byrt*, it is so laid down by Chief Justice *Holt*, expressly.

Now these were goods of the assignees. And they may maintain an action, either against the plaintiff in the cause, or the sheriff, or the vendee of the goods: and the sheriff is the properest person against whom to bring the action.

The gist of an action of trover is the conversion: the finding is not the material part.

And they cited several *nisi prius* cases, of actions brought by assignees of bankrupts: *viz.*:

M. 11 G. 1. trover by *Vanderhagen et al.*, assignees of *Daniel*, a bankrupt, v. *Rewise*, a serjeant-at-mace of the city of *London*; S. P. with the present. Lord Chief Justice *Platt* held the action maintainable.

The S. P. was also before Lord Chief Justice *Lee*, in a case of *Bloxholm*, assignee of *Mills*, a bankrupt, v. *Oldham et al.*, at the sittings after Trinity, 1750, at *Guildhall*: in trover against a sheriff, and the former plaintiff, and the vendee (all of them together). It was objected "that the sheriff ought to be acquitted:" but overruled: and verdict against all three.

The seizure there was before the commission, but after the act of bankruptcy.

The second question is, "Whose the goods were at the time of the sale." The writ only commands the sheriff "to sell the defendant's goods:" and if he sells the goods of another person it is a conversion. Second question.

It is beyond doubt that the assignment has relation to the act of bankruptcy: and the assignees stand in the

Argument for
the plaintiffs.

bankrupt's place from that time. 1 Vent. 193, *Monk v. Morris and Clayton*, proves this, and 2 Co. 25.

Here then the assignees had all the property that the bankrupt had, at the time of his act of bankruptcy. Consequently the absolute dominion was in them; and the sheriff could not, after such assignment, sell them as the defendant's. Indeed, sheriffs seldom do, in fact, sell the goods without indemnity. But the sheriff has here committed an error, in selling them at all: for they were not the defendant's. He might, it is true, have summoned a jury to inquire "whose goods they were." But still, even their verdict cannot affect the right of the true owner of the goods.

The point about relation backwards does not at all affect the question as to the sale. For the assignment was prior to the sale, though not to the seizure.

And they affirmed that the sheriff not only might, but even ought, in this case, to have returned "*nulla bona*;" that would have been the proper and the true return. And if it had been disputed, he then might have brought the money into court. There is a case, of *Rex v. Brein*, bailiff, of the Savoy, 1 Keb. 901, where the goods were claimed under a bill of sale; the sheriff returned "*nulla bona*;" and the money was ordered to be brought into court by the sheriff; and the return to be made agreeable to the event of a trial of the validity of the pretended bill of sale, after such validity should be tried in an action.

In the present case, the defendants knew of the assignment before they sold the goods, whatever they might do when they seized them. And they could not possibly be obliged to sell them: it is contrary to an express act of parliament, which vests the property in the assignees. So that here the sheriff has sold the goods, not of the bankrupt, but of the assignees.

And supposing that the plaintiffs may bring an action against the plaintiff in the original action, or against the vendee of the goods; yet they seem, both of them, to have better excuses than the sheriff has; and are more innocent. Therefore, why should the assignees be turned

round to them, when they can undoubtedly maintain either trespass or trover against the sheriffs, who have sold the goods, which is a conversion, and will support an action of trover. That the plaintiffs have this election, to bring either trespass or trover, appears from Cro. Eliz. 824, *Bishop v. Lady Montague*, and Cro. Jac. 50, S. C.

Argument for
the plaintiffs.

Therefore they concluded that the action was well brought.

The counsel who argued for the defendants, the sheriffs, agreed that the matter would turn upon the solution of the two questions made by the other side.

Argument for
the defendants.

As to the first question, they said it would be very hard if this action should lie against the sheriffs, and they be put to controvert the act of bankruptcy, which is a matter not all within their knowledge,

First question.

They argued that the sheriffs shall not be considered as wrong-doers: and to prove it, cited 1 Lev. 95, *Turner v. Felgate*; Raym. 73, S. C., 2 Siderf. 126, S. C., and 1 Keble, 822, S. C.; 1 Lev. 173, *Baily v. Bunning*; 1 Siderf. 271, S. C., and 2 Keble, 32, 33, S. C.

The only acts of the sheriffs that can be considered as a conversion are the acts of seizure and sale.

Now they were compellable by the writ of *fieri facias* to seize the goods and levy the debt.

For till the commission and assignment the property was in the bankrupt; and it did not appear that a commission ever would be taken out.

1 Salk. 108, *Cary v. Crisp*, is express in point, "that the property is in the bankrupt till assignment." It was there resolved that the property of the goods is not transferred out of the bankrupt till assignment. 2 Str. 981, *Brassy et al. v. Dawson et al.* accord.

1 Lev. 173, *Baily v. Bunning*. Judgment was for the officer; he being obliged to execute the writ, and could not know of the act of bankruptcy, or that any commission would ever be sued: and the sheriff was holden not to be liable, although he had notice of the assignment.

1 Siderf. 272, S. C. The taking was holden lawful.

Comberb. 123, *Lechmere v. Thorowgood*. The officer

Argument for
the defendants.

shall not be made a trespasser by relation. 3 Mod. 236, S. C., 1 Shower, 12, S. C.

The commission of bankruptcy makes no alteration till assignment; and after assignment there shall be a relation, so far as to avoid all mesne acts of the bankrupt, and even to over-reach this judgment-creditor. Thus far they admitted.

But they insisted that the action ought not to have been brought against the sheriff.

The sheriff is to seize, sell, and return his writ. In proof of this they cited 2 Ld. Raym. 1072, 1074. *Clerk v. Withers*, 1 Salk. 322, 323, S. C. (3d point), 6 Mod. 293, 299, S. C., 1 Siderf. 29. *Harrison v. Bowden*, Cro. Eliz. 235. *Mountney v. Andrews*, 1 Ro. Abr. Execution, 893. Letter B. pl. 2. Dyer, 98, b. and 99, a., s. 57, and the two cases there cited in the margin: and Cro. Eliz. 597, *Charter v. Peter*. From all which cases it appears that the sheriff is not liable to be molested.

1 Salk. 321, *Kingsdale v. Mann*, proves that the seizure is the essential part of the execution: and an execution is an entire thing; and cannot be stopped, after it is once begun. 2 Show. 79, *Cockram v. Welbye*.

And after the sheriff had seized these goods, the original plaintiff (William Godfrey) could oblige the sheriff to return his writ; and yet upon the principles advanced, the sheriff must be put under the greatest hardships. And he had no method to make the assignees of the bankruptcy to give him any assistance towards proving the act of bankruptcy.

Indeed the execution is good, though the writ be never returned. 5 Rep. 90, a., *Hoe's case* (1st resolution).

The only return the sheriff could make, must be, "that he had levied the money" (which could only be by sale). Therefore he was obliged to sell. Consequently the law will not make him a wrong-doer by selling.

The following cases, they said, were in point for them, viz. 1 Lev. 173, *Baily v. Bunning*; 2 Keble, 32, 33, S. C.; 1 Siderf. 271, S. C.; 3 Lev. 191, *Philips v. Thompson*. 1 Show. 12, *Lechmere et al. v. Thorowgood et al.*: Comb. 123, S. C.; 3 Mod. 236, S. C., and *Cole v. Davies et al.*, 1 Ld.

Raym. 724, per *Holt*, in point, as against the sheriff most expressly. Argument for
the defendants.

And the present plaintiffs may have an adequate and complete remedy against the plaintiff in the original action.—As to the cases cited, the gentlemen who have argued on the other side, put it upon the question, “who had the property of the goods?”

Now the property was in the bankrupt at the time of the execution; it was not in abeyance; as it is in the case of an administration. (Which is an answer to the case of *Kiggil v. Player*.)

The sheriff is not in the case of a stranger; for he was obliged to execute and return the writ.

Indeed the sheriff is to execute the writ at his peril: and Carthew, 381, is so; the reason is, because the sheriff may impanel a jury, to inquire “whose the goods are.” But here there were no means for the sheriff to indemnify himself: the goods were undoubtedly then the goods of William Johns, even though he had then committed an act of bankruptcy.

The assignees have not a right to recover the specific goods, but only damages.

Trespass will lie against the plaintiff in the original action, even before he receives the money: though trover indeed would not till after.

It is not certain that an action will lie against the vendee of the sheriff.

As to *Vanderhaven's case*, it is not sufficiently clear how it was, or why it was determined.

But as to the case of *Bloxham v. Oldham*, Mr. Henley did not* insist on the objection, “that the action would not lie against the sheriff;” because it would not help his client; for in that case the sheriff and the plaintiff in the original action were both of them defendants. And the case of 1 Leo. 173, was not indeed, by Lord C. J. *Lee*, thought apposite to that case; but it was not over-ruled by him. And the goods were certainly the goods of the bankrupt till assignment.

* *N.B.* Mr. Hume, who was counsel for the defendant

Argument for
the defendants.

in that case of *Bloxham v. Oldham*, agreed, that the objection against the sheriff's being a defendant, was not insisted upon; because the plaintiff in the original action (who was also a co-defendant with the sheriff there) had indemnified the sheriff: so that it was really a point quite immaterial to the plaintiff (who was at all events liable to the action).

They added, that this was a point of great consequence to all sheriffs and officers; on the other hand, creditors cannot be injured, though sheriffs should be excusable and the original plaintiff only should be liable to the action.

As to what has been said of security taken by the sheriff—the court can take no notice of a sheriff's taking security; nor can they suppose him conscious of a private unknown act of bankruptcy: and it would be very hard if an innocent officer should be hurt by retrospection and relation.

They agreed that this execution may be avoided as against the original plaintiff: 2 Strange, 981, *Brassy et al. v. Dawson et al.*, is a proof that it may. But they denied it, as to rendering the officer liable to an action; for he is excusable, as appears from the cases before cited.

Second ques-
tion.

As to the second question.—The foundation of this action of trover is property in the plaintiff at the time of the seizure, and a tortious and illegal act of conversion; for without both these circumstances, this action will not lie.

Now the property is in the bankrupt till assignment: and the subsequent sale cannot make the sheriff a wrong-doer by a fictitious relation. Raym. 161, *Bilton v. Johnson et al.* “The relation of a teste shall not justify a tort.”

It is said that “this relation is given by act of parliament.” But there are no words in the act of parliament that can make the sheriff a wrong-doer.

If the seizure was lawful, the sale was so too. 2 Ld. Raym. 1074, 1076, *Clerk v. Withers*. Cro. Jac. 515, *Sly v. Finch*. Cro. Eliz. 440, *Boucher v. Wiseman*, March 13, *Parkinson v. Colliford et al.*, executors of a sheriff; Cro.

Car. 539, S. C. ; 1 Jones, 430, S. C. Hob. 206, *Speake v. Richards*. Cro. Eliz. 231, *Mountenay v. Andrews*. The law considers the whole execution as one entire act : the intermediate days are only allowed for the sake of the sheriff. Consequently he may execute the whole at once : he may seize and sell directly. The execution is an entire thing and cannot be stopped, Cro. Eliz., 597, *Charter v. Peeter* ; 6 Mod. 293. *Clerk v. Withers*. Therefore the officer shall be protected.

Argument for
the defendant.

Suppose an action should be brought against the sheriff for the money. He might avail himself perhaps by special pleading, provided he was able to make out the facts he should specially plead : but how could he be able to prove the act of bankruptcy, trading, or assignment ? to all which he is an entire stranger. Therefore it would be hard to suffer such an action to be maintained against him. But all these matters are in the privity of the original plaintiff ; against whom, therefore, the action ought to be brought.

It is said, " the sheriff acts at his peril."

But it is admitted that the method of impanelling a jury would be no protection to him.

The counsel for the plaintiffs replied, that it is stated " that the assignment by the commissioners of bankruptcy was previous to the bill of sale by the sheriffs."

Reply to defen-
dant's argu-
ment.

The sheriff's being always a responsible person, and therefore most likely to be made defendant, is the very reason why he ought to be liable to the party who has received the injury.

The finding, or even the taking possession of goods found, is no wrong : but it is the conversion that makes the person a tort-feasor.

They admitted that the sheriff is not answerable for the irregularity of a judgment (for he is bound to execute the command of the writ). But if he take the goods of another person, instead of the goods of the defendant, he is answerable for that.

It has been said, indeed, that " they were at that time the goods of the bankrupt himself."

Reply.

But be the taking lawful, or not lawful, yet here is an actual conversion, an actual disposition of the goods; which makes him a trespasser *ab initio*.

It has likewise been said that "the court will protect the sheriff." But the relation goes back quite up to the act of bankruptcy.

They denied that the execution is so entire that the sheriff cannot stop in it, after seizure and before sale of the goods. Suppose the sheriff had confessedly seized another person's goods, should he be obliged to sell them? Dalton's Office of Sheriff says, "that the sheriff may impanel a jury; and after that shall not be answerable." Now here he might have either impanelled a jury, or have kept the money in his hands, or brought it into court, till the property of the goods had been determined.

They admitted the general principle of the cases cited on the head of executions; but denied the application of them to the present case. They also denied the principle, "that a sheriff shall never be a tort-feasor by relation;" for he shall in some cases be so, as where he takes the goods with a bad original intention.

As to *Baily v. Bunning*, they endeavoured to distinguish it. In order to which they remarked that there is no finding of an actual conversion, or of what could be called so, by the court: it is only a demand and refusal; which is only evidence to a jury.* And the opinion of the court there went upon the taking, which they held to be legal; whereas here is an actual conversion stated. An action would lie, one would think, against the vendee of the sheriff in point of reason, and the practice does strongly support it; for nine in ten of these actions are brought against the vendees of the sheriff.

* See notes to *Willbraham v. Snow*, 2 Wms. Saund. 47 e; [and *Burroughes v. Bayne*, 5 H. & N. 296; 29 L. J. Exch. 185 S. C.; *Hilbery v. Hatton*, 33 L. J. Exch. 190.]

In the case of *Bloxham v. Oldham*, there was a very material difference, "whether the sheriff should have a verdict for him, or a verdict against him:" for in the one case, he would receive costs; in the other, he must pay them.

The plaintiffs had no right to call upon the sheriffs,

till the return of the writ: and they might then have Reply.
 returned "*nulla bona*." Therefore this is not such a hard case upon the sheriffs, as is suggested. And this is not the only case where the sheriff is to act at his peril: for in taking of bail, &c., he must do so, as well as here.

If the sheriff had returned "*nulla bona*," the *onus probandi* would have lain upon the original plaintiff.

In the case of *Turner v. Felgate*, the sheriff was certainly excusable by virtue of his writ.

In the case of *Cole v. Davis et al.*, in 1 Ld. Raym. 724, the goods were sold before the commission and assignment. For the case is there put, of a commission and assignment, both of them subsequent to the sale of the goods. The words are, "If he seizes and sells, and then a commission is granted, and the goods assigned, the assignee may maintain trover against the vendee: but no action will lie against the sheriff, because he obeyed the writ."

But our reasoning in the present case is founded upon the sale's being an unlawful act.

In the case of *Brassey et al. v. Dawson et al.*, there was no assignment previous to the seizure.

They did not deny that the bankrupt had, in the present case, a sort of property, a defeasible property, in him at the time of taking the goods. But in the case of *Clerk v. Withers*, (reported in 6 Mod. 290, and in 1 Salk. 323, and in 2 Ld. Raym. 1072,) the defendant in the action had the whole indefeasible property in him; and the sheriff ought to have gone on: but that case is not applicable to the present case where the property was only defeasible.

As to the cases cited from Hob. 206, and March 13, they agreed to them.

The time allowed to the sheriff makes no difference, they said; because he has done wrong.

And however entire a thing an execution, in general, may be, yet here it was irregularly executed.

The truth of the return of "*nulla bona*," in this case, depends upon the present question.

Reply.

It is very frequent for sheriffs to be entangled in difficulties about their returns. Here, he might have taken a writ *de proprietate probandâ*.

Baily v. Bunning, turned upon the taking.

Lechmere et al. v. Thorowgood only proves "that the goods were *in custodia legis*." And so they were: but to the purposes of the law; which, in the present case, is for the benefit of the creditors of the bankrupt.

CUR. ADV. VULT.

Judgment.

And now (Tuesday 23rd Nov. 1756) Lord *Mansfield* delivered the opinion of the court; and said they were all agreed, as well his two brethren then present in court, as his brother *Wilmot*, (who was at present engaged in another place,) in their opinion.

There are few facts essential to this case; and it lies in a narrow compass.

He then stated the case, (which see, p. 435, *ante* :) and was very particular in specifying the dates of the several transactions.

The general question is, "whether or no the action is maintainable by the assignees, against the defendants, the sheriffs, who have taken and sold the goods."

It is an action of trover.

Trover
defined.

The bare defining the nature of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution, of the question in this particular case.*

In form it is a fiction: in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use.

The form supposes the defendant may have come lawfully by the possession of the goods.

This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully.

Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action,

* [For the history of the action in its present form see the judgment of Willes, J., in *The London and Westminster Loan Society v. Drake*, 5 Jurist. N. S. 1406; and see *Burroughes v. Bayne*, 5 H. & N. 296; *Evans v. Wright*, 2 H. & N. 527.]

waives the trespass, and admits the possession to have been lawfully gotten.* Judgment.

Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it. * See the note to *Scott v. Shepherd*, ante 425.

This is an action of tort: and the whole tort consists in the wrongful conversion.

Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st, property in the plaintiff; and 2ndly, a wrongful conversion by the defendant.

As to the first, it is admitted in the present case that the property was in the plaintiffs, as on and from the 4th of December (which was before the seizure), by relation.

This relation the statutes concerning bankrupts introduced, to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes consider him as a criminal): they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy; and against all executions not served and executed before the act of bankruptcy.†

Dispositions by process of law are put upon the same foot with dispositions by the party: to be valid, they must be completed before the act of bankruptcy.

Till the making of 19 Geo. 2, c. 32, if the bankrupt had *bonâ fide* bought goods, or negotiated a bill of exchange, and thereupon, or otherwise, in the course of trade paid money to a fair creditor, after he himself had committed a secret act of bankruptcy: such *bonâ fide* creditor was liable to refund the money to the assignees, after a commission and assignment; and the payment, though really and *bonâ fide* made to the creditor, was avoided and defeated by the secret act of bankruptcy.‡

This is remedied by that act, in case no notice was had by the creditor (prior to his receiving the debt), "that his debtor was become a bankrupt, or was in insolvent circumstances."

† But see now 12 & 13 Vict. c. 106, s. 133.

‡ See now 12 & 13 Vict. c. 106, s. 133.

Judgment.

Therefore, as to the first point, it is most clear that the property was in the plaintiffs, as on and from the 4th of December, when the act of bankruptcy was committed.

2ndly. The only question then is, "Whether the defendants are guilty of a wrongful conversion?"

That the conversion itself was wrongful, is manifest.

The sheriffs had no authority to sell the goods of the plaintiffs; but of William Johns only: they ought to have delivered these goods to the plaintiffs, the assignees. Upon the foundation of the legal right, the chancellor, even in a summary way, would have ordered them to be delivered to the assignees.

It is admitted, on the part of the defendants, that the innocent vendee of the goods so seized can have no title under the sale, but is liable to an action; and that Godfrey, the plaintiff, would have no title to the money arising from such sale, but if he received it would be liable to an action to refund.

If the thing be clearly wrong, the only question that remains is, "whether the defendants are excusable, though the act of conversion be wrongful?"

Though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees, by relation, in order to an equal division of his estate among his creditors, yet they do not make men trespassers or criminals by relation, who have innocently received goods from him, or executed legal process, not knowing of an act of bankruptcy: that was not necessary, and would have been unjust.

The injury complained of by this action, for which damages are to be recovered, is not the seizure, but the wrongful conversion.

The assignment was made upon the 8th of December; the sale, not till the 28th of December; the return, not till the octave of St. Hilary, which is the 20th of January.

The sheriff acts at his peril; and is answerable for any mistake: infinite inconveniences would arise, if it were not so.

At the time of the sale and return, it was more notorious Judgment.
 “that these goods belonged to the plaintiffs, than it could probably have been in the case of any third person ; because commissions of bankruptcy, and the proceedings under them, are public in the neighbourhood, and indeed all over the kingdom.”

This conversion is twenty days after the assignment.

The defendants have here made a direct false return : they have returned “that they took the defendant’s goods, &c.,” whereas they were, at the time of the return, notoriously the goods of the assignees, when they were taken. They certainly might, and ought to have returned, “*nulla bona* ;” which was the truth : for the goods taken were, beyond all manner of doubt, the goods of the assignees at the time when the sheriffs took them ; and the bankrupt could have no goods after the 4th of December, when he had committed an act of bankruptcy. They would have been justified by the truth of the fact, if they had made this return : for the bankrupt neither had nor could have any goods of his own, at that time. It is arguing in a circle, to say, “that they could not return *nulla bona*, because they were obliged to sell ; and they were obliged to sell, because they could not return *nulla bona*.”

The seizure is, here, out of the case ; for the point of this action turns upon the injurious conversion.

Therefore, we are all of opinion that the plaintiff is entitled to recover in this action.

But objections have been made, by the gentlemen who have argued this cause on behalf of the defendants.

It has been said “that the execution is entire ; for the debt is discharged by a seizure in *fi. fa.* That being entire, if once lawfully begun, it must be completed ; for goods taken by a *fi. fa.* shall be sold by the representative of the sheriff.”

“That they shall be sold, though the plaintiff dies ; and the money arising from the sale shall not be recovered back by the defendant :” which is the case of *Clerk v. Withers*, 1 Salk. 323, 2 Lord Raym. 1072, S. C., and 6 Mod. 290, S. C.

Judgment.

“That a writ of error is no *supersedeas*.”

“That the sale by the sheriff shall not be avoided against the vendee, by a subsequent writ of error and reversal ;” which is the third point in *Matthew Manning’s case*, in 8 Co. 92.

Answer. All this is true, and upon the plainest reason, as between the plaintiff and defendant, parties to the judgment, in consequence of which the execution issues ; but no way applicable to the case of a third person.

None of these cases authorises the sheriff to sell the goods of a third person : and it is admitted that the vendee is not protected here ; because, at the time of the sale, the sheriff had no authority to sell.

(He then went minutely through the cases ; showing the grounds upon which the determinations proceeded, as against the parties to the judgment, who are bound by it and everything done in consequence of it.)

But the argument, from these principles to the present case, is this : “Here the taking was lawful ; and, therefore, the sheriff was bound to complete the execution by a sale.” Answer. The premises are not true ; and, if they were, the conclusion would not follow.

The taking was
not lawful.

The taking was not lawful ; because they were then the goods of a third person.

But if the taking were lawful, the sheriff ought not to go on to a sale, after a full discovery that the goods then belonged to a third person.

To prove the taking lawful, and that, therefore, the sheriffs shall not be liable to an action, were cited the cases of *Baily v. Bunning*, reported in 1 Leon. 173, 174 ; 1 Siderf. 272, and 2 Keble, 32, 33 ; *Lechmere v. Thorowgood*, in Comb. 123 ; 1 Shower, 12, and 3 Mod. 236 ; and *Cole v. Davis et al.*, 1 Lord Raym. 724.

The fallacy of the argument, from the authority of these cases, turns upon using the word “lawful” equivocally in two senses.

To support the act, it is not lawful ; but, to excuse the mistake of the sheriff, through unavoidable ignorance, it is lawful. Or, in other words, the relation introduced by

the statutes binds the property: but men, who act innocently at the time, are not made criminals by relation; and therefore, they are excusable from being punishable by action or indictment, as trespassers. What they did was innocent, and, in that sense, lawful; but, as a ground to support a wrongful conversion, by sale after a commission publicly taken out, and an actual assignment made, it was not lawful.

In the case of *Baily v. Bunning*, the goods were clearly bound by the teste.* It is best reported in Levinz. The question referred by the special verdict was upon the taking, *viz.*, "whether the party was guilty in the taking:" and the court excused the bailiff for his innocent executing his writ. The case of *Philips v. Thompson*, in 3 Levinz, 192, expressly says "that this resolution in the case of *Baily v. Bunning* was only in excuse of the bailiff for executing the writ."

Siderfin does not seem to know what the court was going upon: for the court tied it up to the taking; whereas he does not seem to distinguish between the trover and the trespass. *Vide* 1 Siderf. 272.

The case of *Lechmere v. Thorouggood* is best reported in 1 Show. 12. And this report, which is the only clear state of it in any of the reports, puts it singly upon the making the officers, who had good authority, and took the goods lawfully, trespassers by relation.

Comberbach, in giving the judgment of the court, which is the only sensible part of his whole report, (for it is plain to me, that he did not understand the former argument on the former day, which is the first part of his report of the case,) agrees with Shower; and says that "the court were of opinion that a construction should not be made, to make the officer a trespasser by relation: for the taking was lawful at the time." But he must be mistaken in the first part of this report, for the Lord Chief Justice *Holt* could never say, "that the property of the goods is vested by the delivery of the *fieri facias*; and the extent for the King afterwards comes too late." No inception of an execution can bar the crown: † this matter was lately very

Judgment.
* [By "The Mercantile Law Amendment Act, 1856," 19 & 20 Vict. c. 97, s. 1, the delivery of the writ to the sheriff is not to prejudice the title to goods acquired by a person bound *fide* and for valuable consideration, without notice of the delivery of the writ, and before actual seizure under it.]

† *Giles v. Grover*, 9 Bing. 528.

Judgment.

fully discussed in the Court of Exchequer in the case of the *King v. Cotton*.

As to the case of *Cole v. Davies et al.*, reported in 1 Lord Raym. 724, "that no action will lie against the sheriff, who, after the bankruptcy, seizes and sells the goods, under a *feri facias* to him directed;" which is there said to be ruled by Lord Chief Justice *Holt* at *nisi prius*, in Hil. 10 W. 3. *These notes were taken in 10 W. 3, when Lord Raymond was young, as short hints for his own use: but they are too incorrect and inaccurate, to be relied on as authorities.* The note states four general resolutions upon evidence, in a trial at *nisi prius*; but does not state the case or question to which the resolutions were applied (though, by the particularity of the fourth resolution, I conjecture that to have been most immediately adapted to the case then in judgment). The first resolution is an *obiter* reference to the determination in *Baily v. Bunning*; and it might not be at all material to attend to the distinction between trover and trespass. Besides, the case there put is of a sale by the sheriff, before the commission; and the conversion might be as excusable as the taking, because he obeyed the writ: whereas here, the goods were not sold till after both commission and assignment. It is a loose note of what was said *obiter*; it manifestly refers to the case of *Baily v. Bunning*; but is no authority applicable to the present case.

There are, in the course of trade, numberless acts of bankruptcy in fact committed, where no commission is ever taken out. Therefore, it would be very hard to make the sheriff a trespasser for taking the goods of a person who might privately and secretly have committed an act of bankruptcy, and, perhaps; many years before too, and on which no commission might ever afterwards issue, and of which the sheriff could not possibly know. But none of these reasons hold, to justify the making a false return, and selling the goods after a commission and an assignment.

Arguments have been urged from inconvenience, if the

sheriff should be made liable; because he is obliged to Judgment.
sell.

But the sheriff may take an indemnity from the plaintiff, in case there be a doubt concerning the property of the goods. Possibly, this court might interfere, if the sheriff was reasonably doubtful about the property: at least, they would have given him time to make his return. Or he might have put it on the parties concerned in interest, to litigate their right, by filing a bill in Chancery against them, to oblige them to interplead,* in order to ascertain to whom the property belonged. Or he might oblige the assignees to prove the act of bankruptcy, and the assignment.

And notwithstanding what has been urged as to the hardships that sheriffs will be under, there can hardly a case exist, where there will be any hardship upon the sheriff, where the taking and sale, or even the sale only, are subsequent to the assignment. But in the present case the sheriffs knew of the bankruptcy, before they sold the goods.

There are much greater hardships upon other third persons concerned in pecuniary transactions with bankrupts: which hardships they are nevertheless left subject to; because it was necessary that they should be so, in order to secure the end and intention of the acts relating to bankrupts; namely, the securing their effects for the equal satisfaction of their creditors.

The commission and assignment are both notorious transactions; so that a sheriff cannot well be hurt, by being left liable to this action: whereas there would be danger, if it were otherwise, of great collusion being practised by sheriffs, on these occasions; which might be encouraged by a contrary resolution. The seizure here is after the act of bankruptcy committed, and, therefore, after the property by relation is vested in the assignees: but that was innocent, and excusable; and *the sheriff shall not be liable by relation, as a wrong-doer*. The gist of this action is the wrongful conversion by the sale; and false return, long after the commission and assignment.

* See now the Interpleader Act, 1 & 2 W. 4, c. 58, s. 6. *Isaac v. Spilsbury*, 2 Dowl. 211; *Ford v. Bayntoun*, 1 Dowl. 357; *Day v. Waldock*, 1 Dowl. 523; [and see *post*, p. 466.]

Judgment. Therefore, *per Cur.* unanimously, the action is maintainable, in this case, against the defendants; and there must be judgment for the plaintiffs.

Judgment for the Plaintiffs.

THAT the right of the assignees to the bankrupt's property dates *primâ facie* from the act of bankruptcy, is so perfectly well known and elementary a position, that it would be a mere waste of time to enlarge upon it. In *Sims v. Simpson*, 1 Bing. N. C. 313, Tindal, C. J., stated it to depend on 6 G. 4, cap. 16, sec. 12, which empowered the Lord Chancellor on petition against any trader having committed an act of bankruptcy, to appoint commissioners, who were to take such order and direction with the body of the bankrupt, as also with all his lands, tenements, and hereditaments, which he should have in his own right, *before he became bankrupt*, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they might be found or known; and to make sale thereof in the manner thereafter mentioned. Upon this general enactment a number of exceptions were engrafted, some arising out of the express words of the statute, others out of the reasonable and equitable construction thereof; (all of which are enumerated and discussed in the various treatises on bankruptcy;) and by the

very sweeping enactment of 2 & 3 Vict. c. 29, which confirmed all *contracts, dealings, and transactions* entered into, and all *executions and attachments* executed or levied, *bond fide*, before the date and issuing of the fiat, without notice of a prior act of bankruptcy. The statutes 6 Geo. 4, c. 16, and 2 & 3 Vict. c. 29, were, however, repealed by the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, [part of which has been repealed by, and the rest incorporated with, "The Bankruptcy Act, 1861," 24 & 25 Vict. c. 134,] which constitutes the basis of the present bankrupt law. That statute preserves the rule of relation to the act of bankruptcy, but [retains] several exceptions, the principal of which are comprised in section 133 [of the 12 & 13 Vict. c. 106].

Section 133 enacts, "that all *payments* really and *bond fide* made by any bankrupt, or by any person on his behalf, before date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bond fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all *conveyances*

by any bankrupt *bonâ fide* made and executed before the date of the fiat or the filing of such petition, and all *contracts, dealings, and transactions* by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition, and *all executions and attachments against the lands and tenements of any bankrupt bonâ fide executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt bonâ fide executed and levied by seizure and sale before the date of the fiat or the filing of such petition*, shall be deemed to be valid, notwithstanding any prior act of bankruptcy, by such bankrupt committed; provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, *notice* of any prior act of bankruptcy by him committed: provided also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any

conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit actionem or judge's order obtained by consent given by any bankrupt by way of fraudulent preference."

The chief difference between the above section and the corresponding enactment in 2 & 3 Vict. c. 29, is that the former requires a sale (which may [but need not] be by bill of sale, *Christie v. Winnington*, 8 Exch. 287; [*Loader v. Hiscock*, 1 F. & F. 132; *Hernaman v. Bowker*, 11 Exch. 760; unless the execution is on a judgment in an action brought for the recovery of more than 50*l.*, in which case by 24 & 25 Vict. c. 134, s. 74, the sale must, unless the Court of Bankruptcy directs otherwise, be by auction]) before the fiat or petition, in order to render an execution valid. [*Hutton v. Cooper*, 6 Exch. 159; *Young v. Roebuck*, 32 L. J. Exch. 260.] So that all executions are now in the same predicament as were formerly those founded upon warrants of attorney. Many of the decisions as to the construction of 2 & 3 Vict. c. 29, will still be found applicable, and the result of them is stated below. The protection given by the statute applies only to cases in which but for s. 133, a prior act of bankruptcy would have rendered the transaction

invalid, and it simply does away with the effect of such *prior act* of bankruptcy if secret. It therefore does not render valid an act which *in itself* is an act of bankruptcy, such as an execution procured by the bankrupt; *Hall v. Wallace*, 7 M. & W. 353. See *Cheston v. Gibbs*, 12 M. & W. 111; *Bird v. Bass*, 6 M. & Gr. 143, 6 Scott, N. R. 928, S. C.; *Whitmore v. Green*, 13 M. & W. 104; *Whitmore v. Robertson*, 8 M. & W. 469; *Rawdon v. Wentworth*, 10 M. & W. 36; *Skey v. Carter*, 11 M. & W. 571; *Lackington v. McLachlan*, 5 Scott, N. R. 874; *Cheston v. Gibbs*, 12 M. & W. 111; *Linnit v. Chaffers*, 4 Q. B. 762. [An execution, executed by seizure only, is not invalidated under this section by an act of bankruptcy subsequent to the seizure and notice of it before the sale; *Edwards v. Scarsbrook*, 3 B. & S. 280; 32 L. J. Q. B. 45].

It was held in the Courts of Queen's Bench and Common Pleas that an execution defeated by bankruptcy was so completely avoided that a subsequent execution, which but for the bankruptcy would have been deferred to that founded on the warrant of attorney, took its place, and had precedence of the fiat; *Goldschmidt v. Hamlet* 6 M. & G. 187, 6 Scott, N. R. 962, 1 D. & L. 501, S. C.; *Graham v. Witherby*, and *Graham v. Lynes*, 7 Q. B. 491; an effect different, as it seems, from that produced by bankruptcy upon a

conveyance valid as against an execution but void as against a fiat; *Oswald v. Thomson*, 2 Exch. 215; *Fawcett v. Fearne*, 6 Q. B. 20 (last point), and *post*, 457; and the above decisions have been questioned by the Court of Exchequer in *Congreve v. Evetts*, 10 Exch. 298, where it was laid down in effect that such avoidance would enure for the benefit of the assignees, and the decisions in *Graham v. Witherby* and *Graham v. Lynes* were stated to have proceeded upon a mistaken view of the opinion of the Court of Exchequer in *Cheston v. Gibbs*.

The words "*bonâ fide*" in the statute, so far as executions are concerned, mean "*really intended to be executed for a bonâ fide debt*," *per* Parke, B., *Edwards v. Cooper*, Kent Assizes, 26 July, 1847. They refer to the conduct of the execution creditor, not that of the bankrupt. *Belcher v. Magnay*, 12 M. & W. 102: [see *Stansfeld v. Cubitt*, 2 De G. & J. 222].

The "notice" in the case of an execution may effectually be given to the execution creditor, or to one of several, *per* Parke, B., *Edwards v. Cooper*, *ubi supra*, or to the attorney in the cause, *Rothwell v. Timbrell*, 1 Dowl. N. S. 778; [in *Brewin v. Briscoe*, 28 L. J. Q. B. 329, it was given to an attorney only employed to act for the plaintiff in the matter of the execution;] but not to the attorney's clerk though at the office of the principal, at least not unless he

have full discretion as to issuing or countermanding the execution, *Pike v. Stephens*, 12 Q. B. 465, 12 Jurist, 746; *Pennell v. Stephens*, 7 C. B. 987; nor to the sheriff or his officer, *Ramsey v. Eaton*, 10 M. & W. 22; (see *Lackington v. Elliott*, 7 M. & Gr. 539, 8 Scott, N. R. 275, S. C., where it was discussed whether notice to a bailiff who distrained was notice to the landlord). And in *Green v. Steer*, 1 Q. B. 710, it was laid down by the Court of Queen's Bench, (in apparent harmony with the language of the statute) that "the knowledge or ignorance of the person who *actually*, not constructively, deals with the bankrupt as to any prior act of bankruptcy is the material question under stat. 2 & 3 Vict. c. 29." Yet the judgment of the same court in *Fawcett v. Fearn*, 6 Q. B. 20, may not be thought altogether to accord with that proposition. In *Fawcett v. Fearn*, it appeared that *Blackwell*, a trader, had committed an act of bankruptcy by assigning his property to *Fawcett*, one of his creditors, and another person, as trustees for the benefit of creditors; goods included in the assignment were seized by the sheriff under *bond fide* executions, at suit of creditors who had no notice of any act of bankruptcy; *Fawcett* paid off the executions, and took an assignment from the sheriff of the goods seized; a fiat afterwards issued against *Blackwell*, and the assignees took pos-

session of the goods; whereupon *Fawcett*, relying on his title as purchaser from the sheriff, sued the assignees in trover; but the court decided against him, stating in the course of the judgment, that, "though the execution creditors themselves, who knew nothing of the act of bankruptcy, nor that the goods might by relation be the property of other persons than the bankrupt, might be protected, the plaintiff, *who became the assignee of the sheriff, with full knowledge of the bankruptcy, is not.*" So far as the decision of that case involves, if it at all involve, the general proposition,—that a purchaser from the sheriff at a sale operative at the time, under a *bond fide* execution at suit of a creditor who had no notice of any act of bankruptcy, may, by reason of notice to himself, be in a worse position than the execution creditor, who has irrevocably received his money,—it is open to this observation, that the purchaser is neither "a person dealing with the bankrupt," nor "a person at whose suit or on whose account the execution issued," therefore not within the words of the statute 2 & 3 Vict. c. 29, s. 1. And, seeing that there was another reason (to be mentioned by and by), apart from the operation of the statute, upon which the decision in *Fawcett v. Fearn* may be sustained, it is possible that a reconsideration of the subject may lead to a correction of some ex-

pressions used in delivering the judgment in that case, and a recurrence to the language of the statute, according to its juster exposition in *Green v. Steer*.

Suppose that the assignment to the trustees in *Fawcett v. Fearne* had been (for any reason of which *Fawcett* was not estopped from availing himself) void as against the execution, and so the sale under the execution had operated upon the goods, the question under discussion would have been raised. If a stranger to the deed had in that case purchased under the execution, he would have been, according to the judgment, undoubtedly entitled to the goods. Then is there anything in the statute to disqualify a man from becoming a purchaser under a valid execution, by reason of his knowing something, which, *if* the execution creditor had known it at the time of the seizure, would have rendered the execution invalid? Next take the simple case of a sale of goods under a valid execution, the creditor being ignorant of any act of bankruptcy, to a purchaser who has never had *any* dealing with the bankrupt, but who knows of an act of bankruptcy committed before the seizure: there is nothing *in the statute* to invalidate such purchaser's title; and, following its express language, it may be concluded to be immaterial who has notice, if the person at whose suit or on whose account the execution

issued, i. e. *the execution credito* (by himself or his agent) have not. The true ground of the decision in *Fawcett v. Fearne* may have been that the execution *did not operate at all* upon the goods; that the assignment to the trustees was valid as against the execution, though afterwards avoided by the fiat; that the goods therefore were not the goods of the execution debtor at the time of the sale; that consequently the sale did not, *at the time it was made*, pass any property in the goods, or confer any new right upon *Fawcett*. *Quod meum est amplius meum esse non potest, et nemo dat quod non habet*. In this view of the case the sale was not a sale of goods which the sheriff was authorised by the writ of fieri facias to seize, and the purchaser, whether with or without notice, had no title as against the assignees.

As to *what* notice is sufficient, it has been decided that a general notice that J. S. has committed "an act of bankruptcy," *Udall v. Walton*, 14 M. & W. 254, [*Turner v. Hardcastle*, 11 C. B. N. S. 683,] or a notice that he has done something which amounts to an act of bankruptcy, as that he has made a conveyance of all his property for the benefit of his creditors, *Lackington v. Elliott*, 8 Scott, N. R. 275, or that he has *filed* (though not gazetted) a declaration of insolvency pursuant to [24 & 25 Vict. c. 134, s. 72, by which act (see Sched. (G)) the 12 & 13 Vict. c.

106, s. 70, which was a re-enactment of] 5 & 6 Vict. c. 122, s. 22, [has been repealed.] *Follett v. Hoppe*, 5 C. B. 226, *Green v. Laurie*, 1 Exch. 335, [or that he has filed a petition for arrangement with his creditors, if subsequently the circumstances occur under which such petition becomes an act of bankruptcy, *Edwards v. Gabriel*, 6 H. & N. 701, 30 L. J. Exch. 245, affirmed in error, 7 H. & N. 350, 31 L. J. Exch. 114.] is sufficient. But notice of an *intention* to commit, *Exp. Halifax*, 3 M. D. & D. 544, or of a step having been taken towards committing an act of bankruptcy, as that J. S. has signed a declaration of insolvency, *Conway v. Nall*, 1 C. B. 643, or that a docket has been struck, *Hocking v. Acraman*, 12 M. & W. 170, is not sufficient. Notice in the statute means actual knowledge, and not merely the means of knowledge, such as being in possession of an unread letter, containing notice, *Bird v. Bass*, 6 M. & Gr. 143, 6 Scott, N. R. 928, S. C. [See *Cannan v. S. E. Rail. Co.*, 7 Exch. 843. The general rule upon this subject is thus laid down by Parke, B.: "Where an act of bankruptcy has been in fact committed, any communication which brings to the knowledge of the execution creditor before the sale the alleged fact that an act of bankruptcy has been committed in a way which ought to induce him as a reasonable man to believe that the notification was true, is a

sufficient notice." *Hope v. Meek*, 10 Exch. 829, and see *Brewin v. Briscoe*, 28 L. J. Q. B. 329.]

As this note is, for the most part, confined to executions, let it suffice here for further exposition of the [12 & 13 Vict. c. 106] to refer, as to its effect,—Upon a lien, to *Bowman v. Malcolm*, 11 M. & W. 833, *per* Parke, B.; [*Hoguard v. Mackenzie*, 25 Beav. 493; *Shuttleworth v. Hernaman*, 1 De G. & J. 322];—Upon a distress, to *Lackington v. Elliott*, 8 Scott, N. R. 275;—Upon payment by the bankrupt, to *Turquand v. Vanderplank*, 10 M. & W. 180, *per* Alderson, B.; *Green v. Bradfield*, 1 Car. & K. 449;—Upon payment by an agent for the bankrupt, to *Kynaston v. Crouch*, 14 M. & W. 266;—Upon mutual credit, to *Bittleston v. Timmins*, 1 C. B. 389, *per* Cresswell, J.; [*Lee v. Bullen*, 27 L. J. Q. B. 161];—Upon reputed ownership, to *Fawcett v. Fearn*, 6 Q. B. 20, (first point,) which shows that the assignees are still only entitled, in any event, to such goods as were in the reputed ownership of the bankrupt with the consent of the true owner at the time of the act of bankruptcy; and to *Pariente v. Pennell*, 2 Mo. & Rob. 517, *In re Styon*, 2 M. D. & D. 219, approved of by the Court of Exchequer, and *Young v. Hope*, 2 Exch. 105, from which it appears that if the consent of the true owner be *bonâ fide* retracted by some act done before fiat without notice of the act of bankruptcy,

the inchoate right of the assignees is defeated. The same law was acted upon in *Graham v. Furber*, 14 C. B. 134: and in *Brewin v. Short*, [5 E. & B. 227;] 19 Jurist, 798, the Court of Queen's Bench laid down that the word "transactions" in the 133rd section is used in its ordinary sense of "act, doing, negotiation, or dealing," and that if before the filing of the petition, and without notice of an act of bankruptcy, the true owner *bond fide* demands possession of the goods, and, communicating with the bankrupt, does that which shows that the goods do not longer, with his consent, remain in the possession, order, and disposition of the bankrupt, the title of the true owner is not defeated by a prior act of bankruptcy. Under the circumstances of that case, however, they held that enough had not been done to prevent the operation of the 125th section. [See also *Reynolds v. Hall*, 4 H. & N. 519, where the fact that the goods had been shortly before the *fiat* advertised and put up for sale by the actual owner, but not in his name, or as his property, was insufficient to take the case out of this section; and see *Barrow v. Bell*, 5 E. & B. 540, where the seizure of the goods by the sheriff under a *fi. fu.* against the reputed owner of them, no apparent change of possession having ensued, was held not to have the effect of protecting the actual owner from that section.

See *Ex parte Baldwin*, 27 L. J. Bankr. Cases, 17. Goods mortgaged absolutely, but with a provision that the mortgagor may remain in possession until default in payment of the amount advanced on the mortgage, will, if during such possession, either actual or constructive, the mortgagor becomes a bankrupt, be subject to the 125th section; *Hornsby v. Miller*, 28 L. J. Q. B. 99, *Freshney v. Carrick*, 1 H. & N. 653, *Spackman v. Miller*, 12 C. B. N. S. 659.] There seems to be no section in the 12 & 13 Vict. c. 106, [or the 24 & 25 Vict. c. 134,] corresponding to the 84th section of the 6 Geo. 4, c. 16, which, in certain cases rendered valid payment and delivery of goods to the bankrupt, even *after fiat*, if *bond fide* and without notice. See *Cannan v. South Eastern R. Co.*, 7 Exch. 843.

["The Bankruptcy Act, 1861," contains the following important enactment, in s. 81, "If any execution shall be levied by seizure and sale of any of the goods and chattels of any *trader* debtor, upon any judgment recovered in any action personal for the recovery of any debt or money demand *exceeding fifty pounds*, every such debtor shall be deemed to have committed *an act of bankruptcy* from the date of the seizure of such goods and chattels: provided always, that, unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff or other

officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, *but the sheriff or other officer shall not incur any liability by reason of anything done by him as aforesaid*: provided also, that, in case of bankruptcy, the costs and expenses of such action and execution shall be retained and paid out of the proceeds of the sale, and the balance only, after such payment, be paid to the assignees.”]

These enactments, 2 & 3 Vict., c. 29, 12 & 13 Vict. c. 105, [and 24 & 25 Vict. c. 134,] respectively, which have taken place since the 1st Edition of this work was published, have rendered the subject of the remaining portion of this note of much less importance than it formerly was. Still, it is proper to bear in mind the state of things before the acts, both in order to understand rightly the effect of their provisions, and to apply the law in those cases to which they are inapplicable.

Cooper v. Chitty [in which it will be observed that the assignees are stated by Lord Mansfield, p.

453, to have had *notice* of the bankruptcy at the time of the sale] became celebrated on account of the frequent discussions which occurred upon the question, whether the liability of the sheriff in such cases was not to be confined to acts done by him *with notice* of the bankruptcy, for it had been decided that trespass would not lie against him for taking the bankrupt's goods in execution, after an act of bankruptcy, but without notice thereof, and selling them after commission and notice, *Smith v. Milles*, 1 T. R. 475; *Letchmere v. Thorougood*, 1 Show. 12; and one of the reasons given in those cases, *viz.*, that officers and ministers of justice were not to be made trespassers by relation, was said to apply to actions of trover brought against them, as well as actions of trespass, though certainly the judgment in *Smith v. Milles* will, to any person who will look narrowly at it, appear to be unfavourable to such an extension of the principle therein established; for the court there appears to have thought that the exemption from actions of trespass was not confined to sheriffs and ministers of justice only, but was common to them with the king's other subjects. “There is no instance,” says Ashurst, J., delivering judgment, “that I know of, where a man, who has a new right given him, which, for reasons of policy, is so far made to relate back as to avoid

all mesne encumbrances, shall be taken to have such a possession as to entitle him to bring trespass for an act done before such right was given to him." So that the court appears to have conceived the distinction to be rather between the action of trespass and that of trover, than between ministers of justice and private persons. Indeed, the judgment proceeds: "But at all events the rule will hold with respect to officers and ministers of justice;" and upon this some stress was laid [by the Court of Exchequer] in *Balme v. Hutton*, [2 Tyrwh. 17, 2 C. & J. 19,] as also on a dictum of Buller, J., in *Vernon v. Hankey*, 2 T. R. 122, expressed however in very general words. At last, in *Potter v. Starkie*, 4 M. & S. 260, it was decided that the sheriff *would be liable in trover*, though he seized, sold, and paid over the money before any commission issued, and *before any notice*; and the court said this necessarily followed from *Cooper v. Chitty*, for it was an unlawful interference with another's goods. In *Wyatt v. Blades*, 3 Camp. 396, Lord Ellenborough held the sheriff, who had seized and removed the goods, after an act of bankruptcy, liable, though, on receiving notice from the assignees not to sell, he forebore to do so. It was remarked on these two cases, in *Balme v. Hutton*, that the question, whether an officer of justice be entitled to any peculiar exemption, seems hardly,

if at all, to have been raised in them. The law now appears to have been considered settled, for in *Lazarus v. Waithman*, 5 B. M. 313, *Potter v. Starkie* was recognised; in that case the seizure and sale were both subsequent to the act of bankruptcy and prior to the commission: it is, however, remarked in *Balme v. Hutton*, that the report of *Lazarus v. Waithman* is silent on the points, whether the sheriff had notice of the act of bankruptcy, and whether he was indemnified (for it is proper to observe, that, throughout the whole controversy, it has been admitted, and indeed was expressly held in *Balme v. Hutton*, that if the sheriff be indemnified, he stands on the same ground as the execution creditor who indemnified him, and, in that case, is unquestionably liable). It was further remarked on *Lazarus v. Waithman*, that none of the cases prior to *Cooper v. Chitty* were noticed in it, and that the distinction in favour of the sheriff was not pointed out. In *Price v. Helyar*, 4 Bing. 597, the seizure and sale both took place before notice to the sheriff of any act of bankruptcy; this case was followed and recognised by *Carlisle v. Garland*, 7 Bing. 298, and *Dillon v. Langley*, 2 B. & Ad. 131; and the point was considered settled *against* the sheriff, until, in *Michaelmas Term*, 1831, the famous case of *Balme v. Hutton*, 2 Tyrwh. 17; 2 C. & J. 19, occurred in the Court of Ex-

chequer. That was an action of trover for machinery, brought by the assignees of Bankart and Benson, against *Mr. Hutton*, the sheriff of Yorkshire, *Jewison*, the chief, and *Ingham*, the deputy, bailiff, of the Honor of Pontefract, and the *Messrs. Wood*, creditors of Bankart and Benson, to whom [the latter] had given a warrant of attorney, which was duly filed, and judgment signed thereon upon the 14th November, 1825, in which year [on the 31st of December], Bankart and Benson committed an act of bankruptcy. On the 25th of January, 1826, *Ingham*, as *Jewison*'s deputy, seized the property in question, by virtue of a warrant directed to *Ingham* and *Jewison*, founded on a *fi. fa.* which had issued upon the last-mentioned judgment, and was directed to the sheriff, *Mr. Hutton*. On the same day, the property was sold by *Ingham* to a clerk of Messrs. Wood, who executed a bond of indemnity to *Ingham*. On the 21st of February, a commission issued against Bankart and Benson, under which the plaintiffs became assignees. Neither *Mr. Hutton*, *Jewison*, nor *Ingham* had any notice of the bankruptcy, before the return of the *fi. fa.*

At the trial a general verdict was found for *Mr. Hutton*, and against *Messrs. Wood*, and a special verdict, containing the above facts, as to the liability of *Jewison* and *Ingham*.

The case was ably argued before

the Court of Exchequer, and the court, after consideration, delivered one of the most elaborate judgments on record.

They held, 1st, that *Ingham*, having been indemnified by *Messrs. Wood*, stood on the same footing with them, and was clearly liable.

2nd. That the liability of *Jewison* was not altered by his having taken the usual indemnity from his bailiff *Ingham* against all *Ingham*'s acts as deputy.

3rd. They proceeded to consider the main question, *viz.*, whether *Jewison* was liable for having seized and sold after the bankruptcy, but without notice thereof. In order to determine this, they proceeded to a minute examination of *Cooper v. Chitty*, and the authorities previous and subsequent to it, and arrived at the conclusion, that the defendant *Jewison* was exempted from liability by his official character, upon the ground that *Bailey v. Bunning*, 1 Lev. 173; *Letchmere v. Thoroughgood*, 3 Mod. 236, 1 Shower, 12, Comb. 123, and *Cole v. Davies*, Lord. Raym. 724, had established a distinction between the case of the sheriff and that of an execution creditor; that this distinction was supported, not impugned by *Cooper v. Chitty*; that it was mentioned with approbation in several cases, which will be found cited and commented upon in the judgment, and that it was entirely overlooked in *Potter v. Starkie*, and the subsequent cases

which have been above enumerated. Judgment therefore was given for *Jewison*, and against *Ingham*.

This judgment was carried by writ of error to the Exchequer Chamber, see report, 9 Bing. 471; where it was reversed [as regards the defendant *Jewison*] by Tindal, C. J., Park, Littledale, Bosanquet, Taunton, and Patteson, JJ., contrary to the opinion of Gaselee, J. Lord Tenterden, who had died pending the argument, was stated by Tindal, C. J., to have been of opinion with the majority.

In the mean while, a writ of error had been brought on the judgment of the Court of Common Pleas, in *Carlisle v. Garland*; the judgment of the Court of Error is reported in 3 Tyrw. 705; 10 Bing. 452; it was subsequent to that in *Balme v. Hutton*, and the judges were equally divided upon the main point, that, *viz.*, discussed in *Balme v. Hutton*; Littledale, Parke, and Taunton, JJ., and Gurney, B., being of opinion that the judgment of the court below ought to be affirmed; and Denman, C. J., Bayley, Vaughan, and Bolland, Barons, being of opinion that it ought to be reversed except as to 5*l.*, to which all the judges agreed that the plaintiffs were entitled, there being no doubt that there had been a conversion of their goods to that amount. A writ of error upon this judgment was afterwards brought in the House of

Lords, where judgment was given in accordance with the decision of the Exchequer Chamber in *Balme v. Hutton*; *Garland v. Carlisle*, [4 Cl. & Fin. 693, 4 Scott, 586], 3 M. & W. 152, S. C., 4 Bing. N. C. 7.

[Thus it became settled that the sheriff was liable in trover for a sale by him under a *fi. fa.*, although he had not notice of the bankruptcy, but now by the section above set forth (s. 133 of 12 & 13 Vict. c. 106), except in cases of fraudulent preference the execution is valid if *bond fide* executed and levied before the fiat or filing the petition, without notice to the execution creditor of the prior act of bankruptcy.]

In *Groves v. Cowham*, 10 Bing. 5, a point was determined on the construction of [one of] the *insolvent* acts, similar to that decided on the construction of the bankrupt act, in *Cooper v. Chitty*. On the 10th of June, judgment was signed on his *cognovit* against one Bowler, who, on the 19th of the same month, petitioned the Insolvent Debtors' Court for his discharge; upon the 20th, the sheriff seized his goods under *fi. fa.*, issued on the above judgment; on the 23rd, Bowler assigned all his effects to the provisional assignee, notice whereof was forthwith communicated to the sheriff, who was requested not to sell, which he however did, and paid over the proceeds. The court held that he was liable in trover,

in consequence of the thirty-fourth section of 7 Geo. 4, c. 57; which enacts, that, "in all cases where any prisoner, who shall petition the court for relief under that act, shall have executed any warrant of attorney, &c., to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise *no person shall, after the commencement of the imprisonment of such prisoner, avail himself, or herself, of any execution issued, or to be issued, upon such warrant of attorney, or cognovit actionem, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof*; but that any person or persons to whom any sum or sums shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and may be a creditor or creditors for the same under that act." The court held that the words marked in italics effected a statutory supersedeas of the execution; that the case was, therefore, governed by *Cooper v. Chitty*, and that trover was maintainable against the sheriff. [The section above set forth was re-enacted by s. 61 of 1 & 2 Vict. c. 110, which has been repealed by 24 & 25 Vict. c. 134, s. 230. See Sched. (B.)] So trover might be maintained against the sheriff for the sale of goods under an execution avoided by 6 Geo. 4, c. 16, s. 108; *Cheston v.*

Gibbs, 12 M. & W. 111, per cur. *Graham v. Witherby*, 7 Q. B. 491; [that section also has been repealed, and 12 & 13 Vict. c. 106, s. 184, substituted.] But trover cannot be maintained against the sheriff for a conversion of the goods of the assignees, when the act relied upon as a conversion has taken place before the act of bankruptcy. Thus, in *Brookes v. Mitchell*, 6 N. C. 349, 8 Scott, 739, S. C., where the goods had been seized before the act of bankruptcy under a warrant of attorney void by 3 Geo. 4, c. 39, it was held that the assignees could not maintain trover, see *Everett v. Wells*, 2 Scott, N. R. 525, 2 M. & Gr. 209, S. C.; [*Billiter v. Young*, 6 E. & B. 1; in Dom. Proc. 8 H. of L. Ca. 682; 30 L. J. Q. B. 153;] so where the sheriff had sold goods before the act of bankruptcy, it was held that the assignees could not, by a subsequent demand, render him liable in trover, *Edwards v. Hooper*, 11 M. & W. 363.

The assignees, however, in cases like *Cooper v. Chitty*, were not bound to sue the sheriff in trover; they [might] waive the tort and bring money had and received for the proceeds of the goods, *Kitchen v. Campbell*, 3 Wils. 304; *Young v. Marshall*, 8 Bing. 43; *Clark v. Gilbert*, 2 Bing. N. C. 343.

[It should be observed that there can be no relation of title to an act of bankruptcy if the adjudication is not founded on an act of bankruptcy, as, for instance,

where a trader in the course of proceedings on a petition by himself to the Court of Bankruptcy for protection against process, is adjudged a bankrupt under 12 & 13 Vict. c. 106, s. 223, *Nicholson v. Gooch*, 5 E. & B. 999; *Mönk v. Sharp*, 2 H. & N. 540; see *Ex parte Harrison*, 26 L. J. Bankruptcy Cases, 30; *Paull v. Best*, 3 B. & S. 537; 32 L. J. Q. B. 96. It is scarcely necessary to add that a transfer, by the trader, made by way of fraudulent preference, is *voidable* by the assignees appointed under such adjudication. Such transfer is not, however, absolutely *void*, and mesne dispositions of the property to persons ignorant of the fraud are valid, if made before the appointment of assignees, or election by them to avoid the fraudulent transfer (*Stevenson v. Newnham*, 13 C. B. 285), on the principle according to which, in general, contracts for the sale of goods obtained by fraud on the part of the purchaser, are held to be void only at the election of the vendor, and the election not to be exercisable after the goods have passed into the hands of a *bonâ fide* purchaser, *White v. Garden*, 10 C. B. 919; and see *Kingsford v. Merry*, 11 Exch. 577, reversed in error, 1 H. & N. 503, but on a different statement of the facts, *Higsons v. Burton*, 26 L. J. Exch. 342. But where the adjudication is founded on an act of bankruptcy, and other acts of bankruptcy which would

have supported the adjudication were previously committed, the relation will extend back to those other acts, *Stansfeld v. Cubitt*, 2 De G. & J. 222. Under the *insolvent* acts there was no relation; the title of the assignee never went further back than the vesting order, see *Billiter v. Young*, 6 E. & B. 10; but these acts, that is to say, the 1 & 2 Vict. c. 110 (excepting some sections not relating to insolvent debtors), the 5 & 6 Vict. c. 116, the 7 & 8 Vict. c. 96 (excepting some sections, the principal of which do not concern insolvents), and the 10 & 11 Vict. c. 102, have been repealed by the Bankruptcy Act, 24 & 25 Vict. c. 134, which eradicates the distinction between the law of bankruptcy and insolvency by abolishing the insolvent debtors courts and rendering non-traders liable to be adjudicated bankrupt, and in other respects dealt with according to the law of bankruptcy, in the event of their committing any of the acts of bankruptcy which the statute specifies. In two instances, s. 84 and s. 103, the act defines the period to which an adjudication under it is to relate back.]

The danger of the sheriff's position is now, however, greatly lessened; for by st. 1 & 2 Will. 4, c. 58, commonly called the *Interpleader Act*, on any claim being made by assignees of bankrupts or others, to any goods or chattels taken, or intended to be taken, in

execution, or to the proceeds and value thereof, the sheriff or officer may apply to the court from which the process issued, which may thereupon exercise for his protection and for the adjustment of such claims the powers and authorities thereinbefore contained in that statute and the costs of all such proceedings shall be in the discretion of the court. The powers and authorities alluded to are given by the previous sections of the act, and enable the court to call the parties before them by rule, to hear and adjudicate upon their claims, and, if necessary, to order them to try an action or one or more feigned issues, for the determination thereof. But, in order that the sheriff may avail himself of this act, he must be perfectly without interest; *Dudden v. Long*, 1 Bing. N. C. 300; *Ostler v. Bower*, 4 Dowl. 259; nor must he collude with either party; *Braine v. Hunt*, 4 Tyrw. 244; *Cook v. Allen*, 3 Tyrw. 586; [see *Holt v. Frost*, 3 H. & N. 831;] and the court will not receive his application merely *quia timet*, a claim must actually have been made upon him, *Bentley v. Hook*, 4 Tyrw. 230; *Isaac v. Spilsbury*, 10 Bing. 3; though it has been said that if a claim is made, and he *intends* to buy, he may apply before actual seizure, *Day v. Carr*, 7 Exch. 883, [as to which case,

see *Cooper v. Asprey*, 32 L. J. Q. B. 208; *ibid.* 211, note (5).] He must apply within a reasonable time, *Mutton v. Young*, 4 C. B. 371. The powers given by this act for the relief of sheriffs may now be exercised by a judge sitting at chambers. Stat. 1 & 2 Vict. c. 45, s. 2, [and by "The Common Law Procedure Act, 1860," (23 & 24 Vict. c. 126,) s. 14, the court or judge, upon the hearing of any rule or order calling upon claimants to appear and state their claims, may, when from the smallness of the amount or value in dispute, it appears desirable to him or them so to do, at the request of either party, decide upon the claims summarily. By s. 15, in any cases of interpleader proceedings where the question is one of law, and the facts are not in dispute, the judge may, at his discretion, decide the question without directing an action or issue; and, if he thinks it desirable, order a special case to be stated. An interpleader order will not be granted in Chancery, if the court be not satisfied, that the sheriff had good ground for supposing the goods seized to be those of the execution debtor, or if the sheriff does not apply for the order at the earliest moment, *Tufton v. Harding*, 29 L. J., Cha. 225].

MILLER v. RACE.

HILARY, 31 GEO. 3.

[REPORTED 1 BURR. 452.]

Property in a bank-note passes like that in cash, by delivery; and a party taking it bonâ fide and for value, is entitled to retain it as against a former owner from whom it has been stolen.

IT was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney, or bearer, on demand.

The cause came on to be tried before Lord *Mansfield*, at the sittings in Trinity term last at Guildhall, London: and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton, in Oxfordshire; that on the same night the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed that, in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them, as cash; and that in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, and

without any further inquiry or evidence of title than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery on the 13th of December, applied to the Bank of England "to stop the payment of this note;" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this the plaintiff applied to the bank for the payment of this note; and, for that purpose, delivered the note to the defendant, who is a clerk in the bank; but the defendant refused either to pay the note or to re-deliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21*l.* 10*s.* damages; subject, nevertheless, to the opinion of this court upon this question—"Whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank-note to entitle him to recover in the present action?"

Mr. *Williams* was beginning on behalf of the plaintiff;—

But Lord *Mansfield* said, "That as the objection came from the side of the defendant, it was rather more proper for the defendant's counsel to state and urge their objection."

Sir *Richard Lloyd* for the defendant.

Argument for
defendant.

The present action is brought not for the money due upon the note, but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question: the note is only an evidence of the money's being due to him as bearer.

The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer: though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can or cannot stop

Argument for
defendant.

payment : that is another question. But the note is only an instrument of recovery.

Now this note, or these goods (as I may call it), was the property of Mr. Finney, who paid in the money : he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected, "that this note is to be considered as cash in the usual course of trade." But still the course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note ; and not to bring his action against the bank, for the money. In which action of trover property cannot be proved in the plaintiff, for a special proprietor can have no right against the true owner.

The cases that may affect the present are 1 Salk. 126, M. ; 10 W. 3 ; *Anonymous*, coram *Holt*, Chief Justice, at *Nisi Prius* at Guildhall. The Lord Chief Justice *Holt* held, "That the right owner of a bank-bill, who lost it, might have trover against a stranger who found it : but not against the person to whom the finder transferred it for a valuable consideration, by reason of the course of trade, which creates a property in the assignee or bearer." 1 Lord Raymond, 738, S. C., in which case the note was paid away in the course of trade : but this remains in the man's hands, and is not come into the course of trade. H. 12 W. 3 B. R. ; 1 Salk. 283, 284, *Ford v. Hopkins*, per *Holt*, Chief Justice, at *Nisi Prius* at Guildhall. "If bank-notes, exchequer-notes, or million-lottery tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action, into whatsoever hands they are come. Money or cash is not to be distinguished : but these notes or bills are distinguishable, and cannot be reckoned as cash ; and they have distinct marks and numbers on them." Therefore the true owner

may seize these notes wherever he finds them, if not passed away in the course of trade.

Argument for defendant.

1 Strange 505. H. 8 G. 1. In Middlesex, coram Pratt, Chief Justice, *Armory v. Delamirie**—A chimney-sweeper's boy found a jewel. It was ruled, "that the finder has such a property as will enable him to keep it against all but the rightful owner; and, consequently, may maintain trover."

* [See this case set forth at large, ante, p. 315.]

This note is just like any other piece of property, until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Mr. *Williams* *contra*, for the plaintiff.

Argument for plaintiff.

The holder of this bank-note, upon a valuable consideration, has a right to it, even against the true owner.

1st. The circulation of these notes vests a property in the holder, who comes to the possession of it upon a valuable consideration.

2ndly. This is of vast consequence to trade and commerce: and they would be greatly incommoded if it were otherwise.

3rdly. This falls within the reason of a sale in market-overt; and ought to be determined upon the same principle.

First—He put several cases where the usage, course, and convenience of trade, made the law, and sometimes even against an act of parliament, 3 Keb. 444, *Stanley v. Ayles*, per *Hale*, Chief Justice, at Guildhall; 2 Strange, 1000, *Lumley v. Palmer*, where a parol acceptance of a bill of exchange was holden sufficient against the acceptor, 1 Salk. 23.†

Secondly—This paper credit has been always, and with great reason, favoured and encouraged, 2 Strange, 946, *Jenys v. Fowler et al.*

The usage of these notes is, "that they pass by delivery only; and are considered as current cash; and the possession always carries with it the property." 1 Salk. 126, pl. 5, is in point.

A particular mischief is rather to be permitted than a general inconvenience incurred. And Mr. Finney, who

† [See now "The Mercantile Law Amendment Act, 1856," 19 & 20 Vict. c. 97, s. 6, by which a parol acceptance of a bill of exchange, inland or foreign, is rendered insufficient.]

Argument for
plaintiff.

was robbed of this note, was guilty of some laches in not preventing it.

Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it for want of title against a true owner; even if there was a chasm in the transfers of it through one only out of five hundred hands.

Thirdly—This is to be considered upon the same foot as a sale in market-overt.

2 Inst. 713. "A sale in market-overt binds those that had a right."

But it is objected by Sir Richard, "that there is a substantial difference between a right to the note, and a right to the money." But I say the right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that the robber, or even the finder of a note, has a right to the note; but, after circulation, the holder upon a valuable consideration has a right.

We have a property in this note; and have recovered the value against the withholder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's cases; and agreed that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration, or not in the course of trade: which is all that Lord Chief Justice *Holt* said in 1 Salk. 284.

As to 1 Strange, 505, he agreed that the finder has the property against all but the rightful owner: not against him.

Reply for de-
fendant.

Sir Richard Lloyd in reply:

I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it against the true owner.

This is not only without, but against the consent of the owner.

Supposing this note to be a sort of mercantile cash; yet it has an ear-mark, by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford v. Hopkins*.

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper: it may be as well stopped as any other sort of mercantile cash (as, for instance, a policy which has been stolen). And this has not been passed away in trade; but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away; for this was not passed away. Here, the true owner, or his servant (which is the same thing), detains it. And surely robbery does not divest the property. Reply.

This is not like goods sold in market-overt: nor does it pass in the way of a market-overt; nor is it within the reason of a market-overt. Suppose it was a watch stolen; the owner may seize it, though he finds it in a market-overt, before it is sold there. But there is no market-overt for bank-notes.

I deny the holder's (merely as holder) having a right to the note, against the true owner: and I deny that the possession gives a right to the note.

Upon this argument on Friday last, Lord *Mansfield* then said, that Sir Richard Lloyd had argued it so ingeniously, that (though he had no doubt about the matter) it might be proper to look into the cases he had cited, in order to give a proper answer to them: and therefore the court deferred giving their opinion to this day. But at the same time Lord *Mansfield* said, he would not wish to have it understood in the City that the court had any doubt about the point.

Lord *Mansfield* now delivered the resolution of the court. Judgment.

After stating the case at large, he declared, that at the trial he had no sort of doubt but that this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the whole fallacy of the

Judgment.

argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, *viz.*, to goods, or to securities, or documents for debts.

Now, they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash.

They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will, 900*l.* in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

So, on bankruptcies, they cannot be followed as identical and distinguishable from money: but are always considered as money or cash.

'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark;" but this is not true. *The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency.**

* [See *Foster v. Green*, 7 H. & N. 881; 81 L. J. Exch. 158; and *Taylor v. Plumer*, 3 M. & S. 562.]

So in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bond fide* consideration: but *before money has passed in currency, an action may be brought for the money itself*. There was a case in 1 G. 1, at the sittings, *Thomas v. Whip*, before Lord *Macclesfield*; which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Lord

Macclesfield held that the action lay. Now this must be Judgment. esteemed a finding at least.

Apply this to a case of a bank-note. An action may lie against the finder, it is true; (and it is not at all denied :) but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes: for 1 Salk. 126, M., 10 W. 3, at *Nisi Prius*, is in point. And Lord Chief Justice *Holt* there says, that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee.)

Here an innkeeper took it, *bond fide*, in his business, from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1000*l.* it might have been suspicious: but this was a small note for 2*l.* 10*s.* only: and money given in exchange for it.

Another case cited was a loose note in 1 Ld. *Raym.* 738, ruled by Lord Chief Justice *Holt* at Guildhall, in 1698; which proves nothing for the defendant's side of the question: but it is exactly agreeable to what is laid down by my Lord Chief Justice *Holt* in the case I have just mentioned. The action did not lie against the assignee of the bank-bill; because he had it for valuable consideration.

In that case he had it from the person who found it; but the action did not lie against him, because he took it in the course of currency: and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who *bond fide* took it in the course of currency, and in the way of his business.

The case of *Ford v. Hopkins* was also cited: which was in Hil. 12 W. 3, *coram Holt*, Chief Justice, at *Nisi Prius*, at Guildhall; and was an action of trover for million-lottery tickets. But this must be a very incorrect report

Judgment.

of that case : it is impossible that it can be a true representation of what Lord Chief Justice *Holt* said. It represents him as speaking of bank-notes, exchequer-notes, and million-lottery tickets, as like to each other. Now no two things can be more unlike to each other than a lottery-ticket and a bank-note. Lottery-tickets are identical and specific : specific actions lie for them. They may prove extremely unequal in value : one may be a prize ; another a blank. Land is not more specific than lottery-tickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property : so far the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note, into what hands soever it shall come."

Now the whole of that case turns upon the throwing in bank-notes, as being like to lottery-tickets.

But Lord Chief Justice *Holt* could never say, "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bonâ fide* paid to him ;" even though the action was brought by the true owner : because he had determined otherwise but two years before ; and because bank-notes are not like lottery-tickets, but money.

The person who took down this case, certainly misunderstood Lord Chief Justice *Holt*, or mistook his reasons. For this reasoning would prove, (if it was true, as the reporter represents it,) that if a man paid to a goldsmith 500*l.* in bank-notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash ; and paid and received as cash ; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery, on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them

to the widow and administratrix of the person to whom they were made payable; upon her giving bond, with two responsible securities, (as is the custom in such cases,) to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill; which was dismissed, because she either could not, or would not, give the security required. No dispute ought to be made with the bearer of a cash note; in regard to commerce, and for the sake of the credit of these notes; though it may be both reasonable and customary to stay the payment, till inquiry can be made whether the bearer of the note came by it fairly or not.

Lord *Mansfield* declared that the court were all of the same opinion for the plaintiff; and that Mr. Justice *Wilmut* concurred.

Rule—That the *pastea* be delivered to the plaintiff.

THE general rule of the law of England is, that no man can acquire a title to a chattel personal from any one who has himself no title to it, except only by sale in market-overt, *Peer v. Humphrey*, 2 Ad. & Ell. 595. [*Nemo dat quod non habet*, see *Whistler v. Forster*, 32 L. J. C. P. 161.]

The case of *Miller v. Race*, however, has established an exception in the case of negotiable instruments, the property in which will pass, like that in coin, along with the possession, when they have been put into that state in which, according to the usage and custom of trade, they are transferred from one man to another by delivery. This was again determined in *Grant v. Vaughan*, 3 Burr. 1516, in the case of a draft by a merchant on his banker; and in *Gorgier v. Mievill*, 3 B. & C. 45,

in the case of a bond given by the King of Prussia, by which he declared himself and his successors bound to every person who should for the time being be the holder of the bond, and which was proved to be saleable in the market, and (with other bonds of a like description) to pass from hand to hand at a variable price. See *Lickbarrow v. Mason*, 5 T. R. 683, *post*; *Gurney v. Behrends*, 3 E. & B. 633, per. cur., 18 & 19 Vict. c. 111, respecting *Bills of Lading*;—*Zwinger v. Samuda*, 7 Taunt. 265; *Lucas v. Dorrein*, Ibid. 278, as to *Dock Warrants*.—*McLae v. Sutherland*, 3 E. & B. 1, as to a *Promissory Note* with coupons.—*Brandao v. Barnett*, in the Common Pleas, 1 M. & Gr. 909; 2 Scott, N. R. 96, in the Exchequer Chamber, 6 M. & Gr. 630; 7 Scott, N. R. 30, in

the House of Lords, 12 Cl. & Fin. 787, as to *Exchequer Bills*.—*Partridge v. Bank of England*, Cam. Scac. 9 Q. B. 396, as to *Dividend Warrants*.—[*Keene v. Beard*, 8 C. B. N. S. 372; *Eyre v. Waller*, 5 H. & N. 460; 29 L. J. Exch. 246, S. C.; *Serrell v. The Derbyshire Rail. Co.*, 9 C. B. 811; *Whistler v. Forster*, 32 L. J. C. P. 161; *Watson v. Russell*, 34 L. J. Q. B. 93, as to *Cheques on Bankers*, and *Dixon v. Bovill*, 3 Macq. H. of Lords C. 1, as to *Iron scrip Notes*.] See also *Lang v. Smith*, 7. Bing. 284, the facts of which will presently be stated. In the *Attorney-General v. Bouwens*, 4 M. & W. 171, the forms of several foreign securities accustomedly transferable like cash in this country will be found.

A negotiable instrument being clearly transferable by any person holding it, so as by delivery thereof to give a good title "to any person honestly acquiring it," per Abbott, C. J., 3 B. & C. 47, the next question is, what instruments may with propriety be termed negotiable. And to this it may be answered, That whenever an instrument is such that the *legal* right to the property secured thereby passes from one man to another by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it *bond fide*, and for value, whatever may be the defects in the title of the person transferring it to him.

[The privilege of negotiability is an exception to the rule that property does not pass by mere delivery or transfer against the will of the owner. It gives the same effect to actual transfer for value, without notice of any defect in the title of the transferor, as if he had title.] An instrument is called negotiable when the *legal* right to the property secured by it passes by its delivery, because, although an instrument may be saleable in the market, and treated in many respects like cash, yet, *if by a transfer of it nothing pass but a right to sue on it in the name of the transferor or original party to it, such an instrument is not properly speaking negotiable*. Thus, in *Glynn v. Baker*, 13 East, 509, an India bond was held not to be a negotiable instrument (there being then no act equivalent to 51 G. 3, c. 64, s. 4, which afterwards rendered India bonds negotiable). In that case the plaintiff and the defendant had lodged their respective India bonds with the same bankers, who improperly sold the defendant's bonds, and on his demand delivered to him those of the plaintiff to the same amount, and payable to the same obligee, *viz.*, *W. G. Sibley*: the defendant not knowing that the bonds handed to him were not his own, afterwards sold them, and received the proceeds. It was held that the plaintiff might recover the amount from him in an action

for money had and received; see *Williamson v. Thompson*, 16 Ves. jun. 443. In *Gorgier v. Mievill*, 3 B. & C. 45, this case was cited, and relied on as an authority against the negotiability of the King of Prussia's bond; but Abbott, C. J., said that the case was distinguishable from *Glynn v. Baker*. "There," said his lordship, "it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like Exchequer Bills."

It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market-overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomedly transferable, or, though it be accustomedly transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however

bonâ fide, if the transferor himself have not a good title to it, and the transfer be made out of *market-overt*.

To illustrate these propositions, bills and notes payable to bearer, or payable to order and indorsed in blank, are beyond all doubt *negotiable instruments* in the full sense of those words, *Solomons v. Bank of England*, 13 East, 135; *Grant v. Vaughan*, 3 Burr. 1516; *Collins v. Martin*, 3 B. & P. 649; *Peacock v. Rhodes*, Dougl. 636; *Wookey v. Pole*, 4 B. & A. 1; [*Theidemann v. Goldsschmidt*, 1 Giff. 142, reversed on appeal, 1 De G. Fish. & J. 4;] for they are both accustomedly transferable like cash, and are also capable of being sued on by the holder *pro tempore*. But if such a bill be specially indorsed, its negotiability is at an end, for it becomes thereby incapable of being sued upon by any one except the special indorsee, *Sigourney v. Lloyd*, 8 B. & C. 622, 5 Bing. 525; *Archer v. Bank of England*, Dougl. 639; *Treuttel v. Barandon*, 8 Taunt. 100.

In *Glynn v. Baker*, the court appears to have been of opinion that even had the jury expressly found the India bond to be negotiable, and to pass accustomedly by delivery, it would not have been so in contemplation of law. "If it be meant," said Lord Ellenborough, "to liken this to the case of bankers' notes, in *Miller v. Race*, as having acquired in fact a negotiable quality, and being re-

ceived as cash, or to ordnance debentures, notes, bills, and other securities of the same description, which are circulated daily in the money market, the fact of such negotiability should be stated. *But supposing it were so stated, how could a right of action be made to pass on these securities by such a practice to the holder of them, where by law no such right passes?* There must always be that impediment existing to the legal negotiability of such instruments which distinguishes them from bills of exchange, and securities of that nature, in which the *legal* interest passes, under the law merchant, by indorsement and delivery to another." Taddy, Serj., cited a case of *Maclish v. Ekins*, to the same point, a short note of which is to be found 13 East, 515. See also *Taylor v. Kimer*, 3 B. & Ad. 321, and *Taylor v. Trueman*, 1 M. & M. 453; (which were, however, decided on the construction of 6 G. 4, c. 94); the conclusion of Baron Parke's judgment in *Hibblewhite v. M'Morine*, 6 M. & W. 216; his remarks in *Daly v. Thompson*, 10 M. & W. 318; and the expressions of Ashurst, J., 2 T. R. 71; [*Dixon v. Bovill*, 3 Macq. H. of L. C. 1.] and *post*. It is submitted, therefore, as at least probable that if the right of suing on an instrument should not appear *upon the face of it* to be extended beyond one particular individual, no usage of trade, however extensive, would

be allowed by the courts (at least in the case of an English instrument) to confer upon it the character and incidents of negotiability. *Accord. Partridge v. Bank of England*, 9 Q. B. 396, which see as to dividend warrants. It is, however, right to mention that there is a case of *Renteria v. Ruding*, 1 M. & M. 511, which seems at first sight to militate against this doctrine. In that case the plaintiff signed a bill of lading for goods shipped in Spain, by Bernardo Echeluze, to be delivered in London, to Messrs. O'Brien on being paid freight, primage, and average: there was no mention of assigns in the bill of lading. The defendants having received the goods, and being sued for freight, Brougham argued that the bill not being assignable by indorsement, they were not liable. A witness was then called, who proved that bills of lading from Spain were frequently in the same form, and were nevertheless treated as assignable by indorsement. Lord Tenterden, after referring to the Treatise on Shipping, page 286, 5th edition, and reading "for if a person accept anything which he knows to be subject to a duty or charge, it is natural to conclude he means to take the duty or charge on himself and the law may very well imply a promise to perform what he so takes upon himself," said, "this seems to me to be the correct principle, and the omission of the words *or their*

assigns makes no difference." Now if *Renteria v. Ruding*, be taken to prove that a bill of lading omitting the words *assigns* is nevertheless assignable, so as to pass the legal right in the goods to the indorsee, it certainly does appear to militate against the doctrine above contended for, and seems also contrary to the opinion expressed by Ashurst, J., in *Lickbarrow v. Mason*, 2 T. R. 71; where his lordship says, "The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable in this respect; therefore, it is similar to the case of a bill of exchange. *If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only, but he has made it an indorsable instrument.*" But if *Renteria v. Ruding* be taken only to show that the delivery up of the goods to the defendants was a sufficient consideration to support a promise on their part to pay the freight, &c., and that such a promise might be implied from their knowledge that the goods they accepted were subject to those charges, the case will be distinguishable, and will be similar to that of *Williams v. Leaper*, 3 Burr. 1886, where the defendant, a broker, being about to sell the goods of A., for the benefit of his creditors, the plaintiff, A.'s landlord, came to distrain them; upon which the broker promised to pay the rent, if the

landlord would permit him to retain and sell the goods; the consideration was held sufficient, and the promise binding. In *Williams v. Leaper*, therefore, the landlord's relinquishment of his lien on the goods for rent was a sufficient consideration to support a promise by a party not being the owner of the goods, but who obtained possession of them by the landlord's relinquishment of his lien, to pay the charge upon them for rent: and *pari ratione*, in *Renteria v. Ruding*, the master's relinquishment of his lien on the goods for freight was a sufficient consideration to support a promise by the defendants, who obtained possession of the goods by the captain's relinquishment of his lien, to pay the charge upon them for freight; and the passage of his work referred to by Lord Tenterden shows that such a promise may be implied; and though *Scaife v. Tobin*, 3 B. & Ad. 523, (which, however, is subsequent to *Renteria v. Ruding*,) decides that a person who is not the owner of goods, does not by the mere receipt of them, with the knowledge that they were subject to a charge, bind himself to pay it; yet it is there laid down by Lord Tenterden, that if such a person receive the goods in pursuance of a bill of lading making the payment of such charge a condition precedent to the delivery of the goods, or if he have notice from the master that if he take the goods he must

take them subject to the charge, he will be liable. Now, in *Rentaria v. Ruding* the defendants claimed to receive the goods by virtue of the bill of lading, which made the payment of freight, &c., a condition precedent to the delivery. And though they might not be, properly speaking, indorsees of the bill; still as they exhibited it, and claimed to receive the goods in pursuance of it, they might fairly be taken to have assented to its terms, so that a promise to pay the charge therein imposed might be implied. See the note to *Lickbarrow v. Mason*, post; [*Moeller v. Young*, 5 E. & B. 7; in error, *Ibid.* 755; and as to demurrage, *Smith v. Sieveking*, in error, 5 E. & B. 589.]

Further—although an instrument may contain nothing on the face of it inconsistent with the character of negotiability, still, if it be not accustomably transferable in the same manner as cash, it will not be looked upon as a *negotiable instrument*. Thus in *Lang v. Smyth* [7 Bing. 284] a question arising whether certain instruments called *bordereaux* and *coupons*, which purported to entitle the bearer to portions of the public debt of the kingdom of Naples, were negotiable instruments; the jury having found that they did not usually pass from hand to hand like money; that finding was held conclusive to show that they were not negotiable instruments.

Whether an instrument which has never been solemnly recognised by the law as negotiable be accustomably transferable by delivery, or not, is a question which must in each case be left to the determination of a jury. It was submitted to the jury in *Lang v. Smyth*, and held to have been rightly so.

It seems to have been thought in *Lang v. Smyth*, that if a question were to arise respecting the negotiability of a foreign instrument, and it were shown not to be negotiable in the country where it was made, the fact of its accustomably passing like cash in this country would not make it negotiable.

“These,” said Tindal, C. J., “are not English instruments, recognised by the law of England, but Neapolitan securities brought to the notice of the court for the first time, and as judges we are not allowed to form an opinion on them *unless supplied with evidence as to the law of the country whence they come*. Judges have only taken upon themselves to decide the nature of instruments recognised by the law of this country, as bills of exchange, which pass current by the law merchant, dividend, warrants or exchequer bills, the transfer of which is founded on statutes, which a judge in an English court is bound to know. It has been urged that in *Gorgier v. Mieville*, the case of the Prussian bonds, no evidence was

given of the foreign law. But evidence was given, that, by the usage of merchants in this country, those bonds passed from hand to hand, which usage could have scarcely existed unless they were negotiable in Prussia, so that evidence as to the law of Prussia was rendered unnecessary. And the question is not so much what is the usage in the country whence the instrument comes, as in the country where it has passed." The rule to be collected from this seems to be that a foreign instrument is not negotiable here, unless negotiable where it was made; but that evidence that it is accustomably transferable from hand to hand in this country, is *prima facie* evidence that it also is so abroad.

One class of cases in which the negotiability of an instrument becomes important, is where a question arises whether, upon the holder's death, it be subject to probate duty. Now, as the ordinary's right to grant probate at all depends on the locality of the effects within his diocese, it has been held that French *rentes*, *American* stock, and debts due from a foreigner, being transferable abroad only, must be considered as locally situate abroad, and, consequently, as exempt from probate duty; but that foreign bills and bonds, given by the Russian, Dutch, and Prussian governments accustomably saleable in the market here are chattels in this country liable to

probate duty, although the dividends upon the Dutch bonds were payable solely at Amsterdam. *Attorney-General v. Bouwens*, 4 M. & W. 171; *Attorney-General v. Hope*, 1 C. M. & R. 530; [S. C. 2 Cl. & F. 84;] 8 Bligh, 44; *Attorney-General v. Dimond*, 1 C. & J. 356; [*Pearse v. Pearse*, 9 Sim. 430.]

It has thus been endeavoured to deduce some rules whereby to ascertain when a particular instrument is or is not negotiable. When once decided to be negotiable, it becomes, as has been already stated, exempted from the ordinary rule respecting chattels personal, and property in it may be transferred by a man who has none in it himself, to a person taking it *bond fide*, and for a good consideration. *Grant v. Vaughan*, 3 Burr. 1516; *Collins v. Martin*, 3 B. & B. 649; *Wookey v. Pole*, 4 B. & A. 1; *Peacock v. Rhodes*, Dougl. 636; *Lawson v. Weston*, 4 Esp. 56; *Snow v. Saddler*, 3 Bing. 610. But a party who has not taken it *bond fide*, and for good consideration, will not be permitted to retain it: for it stands on the same footing as money, except that it is much more easily identified, and money itself could not be retained under those circumstances.

This was decided in *Clarke v. Shee*, Cowp. 197, where the plaintiff's clerk received notes and moneys for his master, and laid them out with the defendant in

illegal insurances of lottery-tickets; the master, being able to prove their identity, was held entitled to recover them. "When money or notes," said Lord Mansfield, "are paid *bonâ fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *malâ fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."

Such being the principle, the contest in each particular case has ever since been whether the circumstances under which the negotiable instrument has passed to the party claiming to hold it, afford evidence of *mala fides*, so as to bring the case within the latter part of the rule laid down in *Clarke v. Shee*, by Lord Mansfield. Now, it was very early held that there might be on the part of a person taking a negotiable instrument, negligence of such a description, and so gross, as would afford cogent evidence of *mala fides*; in other words, as would satisfy any reasonable man that the party guilty of it must, or ought to, have suspected that the dealing in which he was engaged was tainted with fraud. This was laid down in *Solomons v. The Bank of England*, 13 East, 135. But the case which has, perhaps, gone furthest on the subject, is *Gill v. Cubitt*, 3 B. & C. 466. That was an action brought upon a bill drawn by *Evered* on

the defendants, and accepted by them. On the 20th of August, 1823, a letter containing this bill, with two others, was enclosed in a parcel, and booked at the Green Man and Still, for Birmingham, where the parcel arrived, but the letter was found to have been opened, and the bills were gone. The plaintiff's nephew swore that on the 21st of August, between 9 and 10, *ante meridiem*, the bill was brought to the office of the plaintiff, a bill-broker in London, by a person whose features were familiar, but whose name was unknown to him, and who desired the bill might be discounted; but the witness, at first, declined to do so, because the acceptors were not known to him: the person, who brought the bill, then said, that a few days before he had brought other bills to the office, and that, if inquiry were made, it would be found that the parties whose names were on this bill were highly respectable: he then quitted the office, and left the bill, and on inquiry the witness was satisfied with the names of the acceptors; the stranger returned after a lapse of two hours, indorsed the bill in name of *Charles Taylor*, and received the full value for it, the usual discount, and a commission of two shillings being deducted: the witness did not inquire the name of the person who brought the bill or his address, or whether he brought it on his own account or otherwise, or how he came by

the bill. It was the practice at the plaintiff's office not to make any inquiries about the drawer or other parties to a bill, provided the acceptor was good. The Lord Chief Justice left it to the jury *whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man*. If they thought he had, they were to find a verdict for the defendant. His lordship asked the jury what they would think if a board were affixed over an office with this notice, "Bills discounted for persons whose features are known, and no questions asked." The jury found for the defendant, and a new trial being moved for, was refused, the Lord Chief Justice saying, he agreed that the case was hardly distinguishable from *Lawson v. Weston*, 4 Esp. 56, but could not help thinking that, if Lord Kenyon had anticipated the consequences, he would have paused before he pronounced that decision. Bayley, J., said, "it is said that the question usually submitted to the consideration of the jury has been whether the bill was taken *bonâ fide*, and whether a valuable consideration was given for it. I admit that has been generally the case, but I consider it was parcel of the *bona fides* whether the plaintiff had asked all those questions which in the ordinary and proper manner in which trade is conducted, a party ought to ask." "It is a question for the

jury," said Holroyd, J., "whether a bill has been taken *bonâ fide* or not, and whether due and reasonable caution has been used by the party taking it." This case has been stated at some length, because it has been the one usually most relied on by persons seeking to invalidate the transfer of a bill, on the ground of want of caution in taking it. It was followed by *Snow v. Peacock*, 3 Bing. 408; *Down v. Halling*, 4 B. & C. 330; *Slater v. West*, Dans. & Lloyd, 15; *Beckwith v. Corral*, 4 Bing. 444; *Strange v. Wigney*, 6 Bing. 677; *Easly v. Crockford*, 10 Bing. 243; which last is a strong case: the plaintiff there, who was robbed of a bank-note for 200*l.*, was held entitled to recover it from the defendant, who had taken it, as he said, in payment of a bet at the Derby, but could not recollect from whom. In *Snow v. Saddler*, 3 Bing. 610, the court had held that a person who received a stolen 30*l.* note in payment of a bet at Doncaster, might retain it against the true owner; but the court distinguished the case, on account of the larger amount of this note. See further, *Burn v. Morris*, 4 Tyrwh. 485; *Haynes v. Foster*, 4 Tyrwh. 66; and *Fancourt v. Bull*, 1 Bing. N. C. 681.

However, a disposition has of late been manifested to relax the strictness with which the conduct of the person receiving a bill or note, improperly come by, has heretofore been regarded. In

Crook v. Jadis, 5 B. & Ad. 909, an accommodation bill for 1000*l.* was fraudulently sold to Howard, for whom the plaintiff discounted it. In an action against the drawer, Lord Denman left it to the jury to find for the plaintiff if they thought he had not been guilty of *gross negligence*, and the court on a motion for a new trial, ruled that that was the correct expression. "I never," said Patteson, J., "could understand what was meant by a party taking a bill under circumstances which ought to have excited the suspicion of a prudent man." (*Vide tamen* the observations of Tindal, L. C. J., in *Vaughan v. Menlove*, 3 Bing. N. C. 475.) This was followed by *Backhouse v. Harrison*, 5 B. & Ad. 1098: there the plaintiff, an officer of a banking company, discounted two discoloured bills, for 20*l.* and 26*l.* 19*s.* 9*d.*, for a man who could not write, and was not known in the town. The bills turned out to have been lost, and the jury found, on questions specially submitted to them, that the plaintiff took the bills *bond fide*, but under such circumstances that a reasonable cautious man would not have taken them. They then found a verdict for the defendant, subject to the question whether he was not estopped from setting up the plaintiff's negligence as a defence, by having himself committed the first negligence in not advertising the loss of the bills. The court, without deciding that

point, set the verdict aside, on the ground that *gross negligence* had not been found by the jury, and that the evidence was not sufficient to warrant such a finding. "I have no hesitation," said Patteson, J., "in saying, that the doctrine first laid down in *Gill v. Cubitt*, and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man, cannot recover it, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I could never understand that a party who takes a bill *bond fide*, but under the circumstances mentioned in *Gill v. Cubitt*, does not acquire a property in it. I think the fact found by the jury here, that the plaintiff took the bills *bond fide*, but under such circumstances that a reasonable cautious man would not have taken them, was no defence. The rule must be absolute for a new trial." *Gill v. Cubitt*, therefore, after overruling *Lawson v. Weston*, may now [no doubt] be itself considered as virtually overruled. See the judgment of the Court of Exchequer, in *Foster v. Pearson*, 5 Tyrwh. 262, where it is observed, that, in consequence of the new rules of pleading, the question, when next raised, will probably be raised on

the record, so that it may receive the decision of a Court of Error. In *Goodman v. Harvey*, 4 A. & E. 870, the Court of Queen's Bench ruled that there must be actual *mala fides*, and that the existence of gross negligence even was unimportant except so far as it might be evidence of *mala fides*. And in *Uther v. Rich*, 10 A. & E. 784, the Court adhered to the decision in *Goodman v. Harvey*, and held that *mala fides* in the holder of a negotiable security, if relied on, must be distinctly alleged; that the only proper mode of implicating him in an alleged fraud is by averring that he had notice of it, and that an allegation that he was not a *bonâ fide* holder is not equivalent to an averment of such notice. And in the *Bank of Bengal v. McLeod*, 7 Moore, P. C. 35, the judicial committee stated broadly that the rule acted upon in *Gill v. Cubitt*, and *Down v. Halling*, was not law. [Further, in *Raphael v. The Bank of England*, 17 C. B. 161, an action upon a bank-note which had been stolen, the jury having found, in answer to questions put by Jervis, C. J.,—first, that the real plaintiffs had given full value for the note, secondly, that they had had notice of the felony, thirdly, that they had no knowledge at the time they took the note that it had been stolen, but *had the means of knowledge if they had taken proper care*, lastly, that they had taken the note *bonâ fide*,—his lordship

directed the verdict to be entered for the plaintiffs, and afterwards the court refused to allow a rule *nisi* for a new trial, moved for on the ground that the plaintiffs on the finding were not entitled to the verdict. In that case, Willes, J., concurred in the opinion given by Parke, B., in *May v. Chapman*, 16 M. & W. 355, that “notice and knowledge” means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes,—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded. See also the direction of Byles, J., in *Oakley v. Ooddeen*, cited Byles on Bills, 8th ed., p. 113; notes (*n*) and (*p*), reported 2 Fost. & Fin. 656; and see *Montefiore v. Browne*, 7 H. of L. Ca. 255, 262. In *Carlow v. Ireland*, 5 E. & B. 764, the plaintiffs had received a cheque drawn on Masterman and Co., and payable to plaintiffs or bearer, and crossed with the words — and Co. They filled up the blank with the name of Dixon and Co., their bankers, and gave the cheque to their clerk to pay it into the bank. He, instead, took it to the defendant, who was a publican, and knew him as a customer, and told the defendant he had received a cheque crossed to a banker, and having no banker of his own could not get it paid. The defendant, to accommodate him, paid it in to his bankers, Gosling and Co., who gave him the

amount, which he handed over to the clerk. Masterman and Co. paid the cheque to Gosling and Co. The plaintiffs sued the defendant in trover for the note, and the above facts having been proved, Lord Campbell, C. J., left it to the jury to say whether the defendant took the cheque *bonâ fide*, and for value. The jury found for the defendant, and were held to have been rightly directed. "The cheque," said Lord Campbell, "was payable to bearer and negotiable. The crossing cannot at once leave it payable to bearer, and also make it not payable to bearer. It leaves it negotiable; and that being so, the question is the same as if it were a bank-note, or any other instrument transferable by delivery; that question is whether it was taken in good faith, not whether there was due care, or whether there were circumstances which ought to have awakened suspicion." (See further, as to the effect of crossing a cheque, 19 & 20 Vict. c. 25, *Simmons v. Taylor*, 2 C. B. N. S. 528; 4 C. B. N. S. 463; 21 & 22 Vict. c. 79.) Evidence of fraud on the part of a *previous* holder raises a presumption that the plaintiff is agent for that holder without value, and therefore casts on him the burthen of proving that he gave value, *Hall v. Featherstone*, 3 H. & N. 284. Notice of fraud given after delivery of a bill payable to order, and before formal indorsement, affects the holder, *Whistler v. Forster*, 32 L. J. C. P. 161.

An instrument may be negotiable although it has not been issued by the party who made it. In *Ingham v. Primrose*, 7 C. B. N. S. 82; 28 L. J. C. P. 294, a bill of exchange was drawn by Murgatroyd and accepted by the defendant without consideration, and solely for the purpose that Murgatroyd should get it discounted and hand over the proceeds to the defendant. Murgatroyd, being unable to get the bill discounted, returned it to the defendant, who thereupon, with the intention of destroying and cancelling it, tore it in two and threw it away. Murgatroyd picked up the bits and pasted them together into their original form, and then fraudulently indorsed the paper over to King, who *bonâ fide* gave value for it as a bill of exchange. Afterwards King's indorsee sued the defendant on the acceptance, and was held to be entitled to the verdict. "It is, we think, settled in law," said Williams, J., "that if the defendant had drawn a cheque, and before he had issued it he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value, without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee. See the judgment in

Marston v. Allen, 8 M. & W. 494. The reason is, that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who, by making them, have caused them to be apparently a part of such currency." If the defendant's act in tearing the bill had been such that the paper on the face of it bore the signs of something having been done to it which is characteristic of an intention to destroy or annul it, as in *Scholey v. Ramsbottom*, 2 Camp. 485, he would not have been liable; but the appearance of the bill was consistent with its having been torn in two for the purpose

of transmission by post, and although the act of reconstructing the bill by joining together the two parts, and issuing the paper formed by the junction as a bill, might have been a forgery, "yet this would be no answer to the plaintiff's claim, because the defendant, by abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiff becoming a holder of it for value, without having any just cause for supposing that it had been cancelled or annulled." The holder of a negotiable instrument may effectually indorse it to a third person without consideration, merely for the purpose of enabling the latter to sue upon it on his, the indorser's, behalf, *Law v. Parnell*, 7 C. B. N. S. 282; *Ancona v. Marks*, 7 H. & N. 686; 31 L. J. Exch. 163, S. C.]

CARTER v. BOEHM.

EASTER.—5 GEO. 3.

[REPORTED 3 BURR. 1905.]

Insurance on Fort Marlborough against foreign capture, effected by its Governor. The weakness of the fort, and the probability of its being taken by the French, and that the insured knew these facts, but had not communicated them, were offered to be proved as a defence to an action on the policy. It was also objected that the insurance was against public policy. The plaintiff proved that the office of Governor was mercantile, not military; and that the fort was never calculated to resist European enemies. Held, that the jury were justified in finding for the plaintiff.

The opinion of an insurance broker as to the materiality of the facts not communicated was thought inadmissible as evidence.

What concealments vitiate a policy.

THIS was an insurance cause, upon a policy underwritten by Mr. Charles Boehm, of *interest, or no interest; without benefit of salvage*.† The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter.

† A policy containing these words would now be illegal, in consequence of 14 Geo. 3, c. 38, against *wager policies*, *Paterson v. Powell*, 9 Bing. 32.

It was tried before Lord Mansfield at *Guildhall*; and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday, the 19th of April last, Mr. Recorder Eyre, on behalf of the defendant, moved for a new trial.

His objection was, “that circumstances were not sufficiently disclosed.”

A rule was made to show cause: and copies of letters and depositions were ordered to be left with Lord Mansfield.

N.B. Four other cases depended upon this.

The counsel for the plaintiff, *viz.*, Mr. Morton, Mr. Dunning, and Mr. Wallace, showed cause on Thursday, the first of this month. But first,

Lord Mansfield reported the evidence. That it was an action on a policy of insurance for one year; *viz.*, from 16th of October, 1759, to 16th of October, 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough, in the island of *Sumatra* in the East Indies, by its being taken by a foreign enemy. The event happened: the fort was taken by Count d'Estaing within the year.

The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the governor's brother, the plaintiff, to him: and the use made of these instructions was to show "that the insurance was made for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides had been long in Chancery: and the Chancery evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the French: which concealment was offered to be proved by two letters. The first was a letter from the Governor to his brother Roger Carter, his trustee, the plaintiff in this cause: the second was from the Governor to the East India Company.

The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the Governor had 20,000*l.* in effects, and only insured 10,000*l.*: and that he was guilty of no fault in defending the fort.

The first of these depositions was Captain Tyron's; which proved that this was not a fort proper or designed to resist European enemies; but only calculated for de-

fence against the natives of the island of *Sumatra*; and also that the Governor's office is not military, but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his lordship had made his report,

The counsel for the plaintiff proceeded to show cause against a new trial.

They argued that there was no such concealment of circumstances (as the weakness of the fort, or the probability of the attack) as would amount to a fraud sufficient to vitiate this contract; all which circumstances were universally known to every merchant upon the Exchange of *London*. And all these circumstances they said were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. Dunning laid it down as a rule—"That the insured is only obliged to discover facts; not the ideas or speculations which he may entertain upon such facts."

They said this insurance was, in reality, no more than a wager; "whether the French would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river or not."

Sir Fletcher Norton and Mr. Recorder Eyre argued, *contra*, for the defendant, the underwriter.

They insisted, that the insurer has a right to know as much as the insured himself knows.

They alleged, too, that the broker is the sole agent of the insured.

There are general, universal principles, in all insurances.

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that he *did not believe that the insurer would have meddled with the insurance, if he had seen these two letters*.

All the circumstances ought to be disclosed.

This wager is not only "whether the fort shall be attacked;" but "whether it shall be attacked and taken."

Whatever really increases the risk ought to be disclosed.

Then they entered into the particulars which had been here kept concealed. And they insisted strongly, that the plaintiff ought to have discovered the weakness and absolute indefensibility of the fort. In this case, as against the insurer, he was obliged to make such discovery; though he acted for the Governor. Indeed, a Governor ought not, in point of policy, to be permitted to insure at all: but if he is permitted to insure, or will insure, he ought to disclose all facts.

It cannot be supposed that the insurer would have insured so low, at 4*l. per cent.*, if he had known of these letters.

It is begging the question to say, "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose; and the presumption was "that the fort, the powder, the guns, &c., were in a good and proper condition." If they were not, (and it is agreed that in fact they were not, and that the Governor knew it,) it ought to have been disclosed. But if he had disclosed this he could not have got the insurance. Therefore this was a fraudulent concealment; and the underwriter is not liable.

It does not follow that, because he did not insure his whole property, therefore it is good for what he has judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. adv. vult.

Lord Mansfield now delivered the resolution of the Court.

This is a motion for a new trial.

In support of it the counsel for the defendant contend, "that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy."

The counsel for the plaintiff insist, "that the not mentioning these particulars does not amount to a concealment which ought, in law, to avoid the policy; either as a fraud, or as varying the contract."

1st. It may be proper to say something, in general, of concealments which avoid a policy.

2ndly. To state particularly the case now under consideration.

3rdly. To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

† *Fitzherbert*
v. *Mather*,
1 T. R. 12.

The keeping back such circumstance is a fraud, and therefore the policy is void.† Although the suppression should happen through mistake, without any fraudulent intention; yet still, the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

The policy would equally be void, against the underwriter, if he concealed; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.

The governing principle is applicable to all contracts and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary.

But either party may be innocently silent as to grounds open to both to exercise their judgment upon. *Aliud est celare; aliud, tacere: neque enim id est celare quicquid*

reticeas; sed cum quod tu scias, id ignorare, emolumentum tui causâ velis eos, quorum intersit id scire.

This definition of concealment, restrained to the efficient motive and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

There are many matters, as to which the insured may be innocently silent; he need not mention what the underwriter knows—*Scientia utrinque par pares contrahentes facit.*

An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the underwriter ought to know†; what he takes upon himself the knowledge of; or what he waives being informed of.

The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation: as for instance, *the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, &c.*

If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere, he needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation.

† See *Elton v. Larkins*, 8 Bing. 198; *Friere v. Woodhouse*, Holt, 572; *Noble v. Kenaway*, Dougl. 510; *Vallance v. Dewar*, 1 Camp. 503; *Stewart v. Bell*, 5 B. & A. 238; *Mackintosh v. Marshall*, 11 M. & W. 116.

Men argue differently, from natural phenomena and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and, therefore, neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; *which one privately knows*, and the other is ignorant of, and has no reason to suspect.

The question, therefore, must always be, "whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run."

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss of Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between the 1st of October, 1759, and the 1st of October, 1760. It was underwritten on the 9th of May, 1760.

The underwriter knew at the time that the policy was to indemnify to that amount Roger Carter, the Governor of Fort Marlborough, in case the event insured against should happen. The Governor's instructions for the insurance, bearing date at Fort Marlborough, the 22nd of September, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company, which the Company offered to put into my hands; but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

An objection occurred to me at the trial, "whether a policy, against the loss of Fort Marlborough, for the benefit

of the Governor, was good ;" upon the principle which does not allow a sailor to insure his wages.†

But considering that this place, though called a fort, was really but a factory or settlement for trade ; and that he, though called a Governor, was really but a merchant : considering, too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner ; and the captain of a privateer, if he be a part-owner, to insure his share : considering, too, that the objection did not lie, upon any ground of justice, in the mouth of the underwriter, who knew him to be the Governor at the time he took the premium—and as, with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to non-suit the plaintiff ; especially, too, as the objection did not come from the Bar.

Though this point was mentioned, it was not insisted upon at the last trial ; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy : and if it had, we are all of opinion "that we are not warranted to say it is void upon this account."

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity ; where they have had an opportunity to sift everything to the bottom, to get every discovery from the Governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved, without contradiction, that the place called Bencoolen, or Fort Marlborough, is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an European enemy ; but merely for the purpose of trade, and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only security

† *i. e.* Because of its tendency to diminish his exertions for the safety of the thing insured : *Webster v. De Tastet*, 7 T. R. 157 ; *Wilson v. R. E. A. Co.* 2 Camp. 626.

against European ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was, in general, well known by most persons conversant or acquainted with Indian affairs, or the state of the Company's factories or settlements ; and could not be kept secret or concealed from persons who should endeavour, by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any attack by the French, until they attacked Nattal in February, 1760. That on the 8th of February, 1760, there was no suspicion of any design by the French. That the Governor then bought, from the witness, goods to the value of 4000*l.*, and had goods to the value of above 20,000*l.*, and then dealt for 50,000*l.* and upwards. That on the 1st of April, 1760, the fort was attacked by a French man-of-war of 64 guns, and a frigate of 20 guns, under the Count d'Estaign, brought in by Dutch pilots ; unavoidably taken ; and afterwards delivered to the Dutch ; and the prisoners sent to Batavia.

On the part of the defendant, after all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760 ; or that there was the least intelligence or alarm "that they might make the attempt" till the taking of Nattal in the year 1760.

They did not offer to disprove the evidence, that the Governor had acted, as in full security, long after the month of September, 1759 ; and had turned his money into goods, so late as the 8th of February, 1760. There was no attempt to show that he had not lost by the capture very considerably beyond the balance of the insurance.

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September, 1759, which was sent to England by the Pitt, Captain Wilson, who arrived in May, 1760, together with the instructions for insuring ; and also a letter bearing date the 22nd of September, 1759, sent to the plaintiff by the

same conveyance, and at the same time, (which letters his lordship repeated) (a).

They relied, too, upon the cross-examination of the broker who negotiated the policy, "that, in his opinion†, these letters ought to have been shown, or the contents disclosed; and if they had, the policy would not have been underwritten."

The defendant's counsel contended at the trial, as they have done upon this motion, "that the policy was void"—

1st. Because the state and condition of the fort mentioned in the Governor's letter to the East India Company, was not disclosed.

2ndly. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3rdly. That he had not disclosed his having received a letter of the 4th of February, 1759, from which it seemed that the French had a design to take this settlement, by surprise, the year before.

They also contended that the opinion of the broker was almost decisive.

The whole was laid before the jury; who found for the plaintiff.

Thirdly—It remains to consider these objections, and to examine "whether this verdict is well founded."

To this purpose it is necessary to consider the nature of the contract, at the time it was entered into.

The policy was signed in *May*, 1760. The contingency was, whether Fort Marlborough was or would be taken by an European enemy, between October, 1759, and October, 1760.

The computation of the risk depended upon the chance, "whether any European power would attack the place by sea." If they did, it was incapable of resistance.

The underwriter at London, in May, 1760, could judge much better of the probability of the contingency than Governor Carter could, at Fort Marlborough, in Sep-

(a) The former of them notifies to the East India Company, that the French had, the preceding year, a design on foot, to attempt taking that settlement by surprise; and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being sadly supplied with stores, arms, and ammunition; and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems they had such an intention last year." And therefore he desires his brother to get an insurance made upon his stock there.

† See *Richards v. Murdock*, 10 B. & C. 527; *Campbell v. Richards*, 5 B. & Ad. 846; 2 Nev. & M. 546.

tember, 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, everything which was known at Fort Marlborough, in September, 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company; and particularly from the Governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he assures against the general contingency of the place being attacked by an European power.

If there had been any design on foot, or any enterprise begun, in September, 1759, to the knowledge of the Governor, it would have varied the risk understood by the underwriter; because, not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted.

But the Governor had no notice of any design subsisting in September, 1759. There was no such design, in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the Dutch, which tempted Count d'Estaing to break his parole.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealments.

The first concealment is, that he did not disclose the condition of the place.

The underwriter knew the insurance was for the Governor. He knew the Governor must be acquainted with the state of the place. He knew the Governor could not disclose it, consistent with his duty. He knew the

Governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote.

By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed various ways: *It was not a matter within the private knowledge of the Governor only.*

But, not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner as it is taken for granted, that a ship insured is seaworthy.*

What is that condition? All the witnesses agree, "that it was only to resist the natives, and not an European force." The policy insures against a total loss; taking for granted "that if the place was attacked, it would be lost."

* [Except in the case of a time policy: *Gibson v. Small*, 4 H. of L. Ca. 353.]

The contingency, therefore, which the underwriter has insured against is, "whether the place would be attacked by an European force;" and not "whether it would be able to resist such an attack, if the ships could get up the river."

It was particularly left to the jury to consider, "whether this was the contingency in the contemplation of the parties;" they have found that it was.

And we are all of opinion, "that, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material, only in case of a land attack by the natives.

The second concealment is, his not having disclosed, that from the *French* not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case; it is mere speculation of the Governor's, from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror, in his own dominions. The practicability of it, in this case, depended upon the *English* naval force in those seas; which the underwriter could better judge

of at *London*, in May, 1760, than the Governor could, at Fort Marlborough, in September, 1759.

The third concealment is, that he did not disclose the letter from Mr. Winch, of the 4th of February, 1759, mentioning the design of the *French* the year before.

What the letter was ; how he mentioned the design, or upon what authority he mentioned it ; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery ; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account Winch wrote to the East India Company ; which was objected to ; and, therefore, not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the strongest light, it is a report of a design to surprise, the year before ; but then dropped.

This is a topic of mere general speculation ; which made no part of the facts of the case upon which the insurance was to be made.

It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud ; I agree to it.† But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance ; because it does not follow that they will cruise this year at the same time, in the same place ; or that they are in a condition to do it. If the circumstance of “this design laid aside” had been mentioned it would have tended rather to lessen the risk than increase it ; for, the design of a surprise which has transpired, and been laid aside, is less likely to be taken up again : especially by a vanquished enemy.

The jury considered the nature of the Governor’s silence, as to these particulars ; they thought it innocent ; and that the omission to mention them did not vary the contract. And we are all of opinion, “that, in this respect, they judged extremely right.”

There is a silence, not objected to at the trial, nor upon

† Acc. *Beckwaite v. Walgrove*, cited 3 Taunt. 41 ; see *Durrell v. Bederley*, 1 Holt, 263.

this motion, which might with as much reason have been objected to as the two last omissions; rather more.

It appears by the Governor's letter to the plaintiff, "that he was principally apprehensive of a *Dutch* war." He certainly had what he thought good grounds for this apprehension. Count d'Estaing, being piloted by the *Dutch*, delivering the fort to the *Dutch*, and sending the prisoners to *Batavia*, is a confirmation of those grounds. And probably the loss of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots: and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension is, because it must have arisen from political speculation, and general intelligence: therefore, they agree it is not necessary to communicate such things to an underwriter.

Lastly: great stress was laid upon the opinion of the broker.

But we all think the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent, or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness.†

There is no imputation upon the Governor, as to any intention of fraud. By the same conveyance which brought his orders to insure, he wrote to the Company everything which he knew or suspected; he desired nothing to be kept a secret which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February, 1760, showed that he thought the danger very improbable.

The reason of the rule against concealments is to prevent fraud and encourage good faith.

† Accord.
Campbell v. Rickards, 5 B. & Ad. 846; 2 N. & M. 546; overruling *Rickards v. Murdock*, 10 C. & C. 527. See *Chapman v. Walton*, 10 Bing. 57.

If the defendant's objections were to prevail, in the present case, the rule would be turned into an instrument of fraud.

The underwriter here, knowing the Governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question.

If the objection "that he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other. He drew the Governor into a false confidence, "that, if the worst should happen, he had provided against total ruin;" knowing, at the same time, "that the indemnity to which the Governor trusted was void."

There was not a word said to him of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection, at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now, after the event.

What has often been said of the Statute of Frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud, "that it should never be so turned, construed, or used, as to protect or be a means of fraud."

After the fullest deliberation, we are all clear that the verdict is well founded; and there ought not to be a new trial; consequently that the rule for that purpose ought to be discharged.

Rule discharged.

THIS case is inserted on account of the masterly exposition of some of the leading principles of insurance law contained in the judgment of the Lord Chief Justice. It would not be proper to pass from it without informing the reader that a great deal of con-

troversy has since taken place upon one of the subjects incidentally touched upon by his lordship, *viz.*, the admissibility of the broker's evidence as to his opinion on the materiality of the facts not communicated. "Great stress," says his lordship, "was laid on the opinion of the broker: but we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion, without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could be drawn only from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness." Very similar were the expressions of Gibbs, C. J., in *Durrell v. Bederley*, Holt, 283: "It is my opinion that the evidence of the underwriters, who were called to give their opinion of the materiality of the rumours, and the effect they would have had upon the premium, is not admissible. *It is not a question of science*, upon which scientific men will mostly think alike, but *a question of opinion*, liable to be governed by fancy, and in which the diversity might be endless." And upon the ground thus stated by Gibbs, C. J., it has been frequently sought to distinguish *Lindenau v. Desborough*, 8 B. & C. 586, in which, in an action on a life policy, the

evidence of medical men, as to the materiality of certain symptoms which had not been communicated, was received and laid before the jury, from the question as to the admissibility of the opinions of brokers and underwriters. In *Rickards v. Murdock*, 10 B. & C. 257, such evidence was, however, admitted. That was an action on a policy, effected by the plaintiff, as agent for Mr. Campbell, of Sydney, upon goods by the ship *Cumberland*. Upon the trial it appeared that Mr. Campbell, having shipped the goods in question by the *Cumberland*, wrote by another ship (the *Australia*) to the plaintiff, desiring him to effect an insurance thereon, and telling him, at the same time, that, in order to give every chance for the *Cumberland's* arrival, he had directed the person intrusted with that letter not to deliver it till thirty days after the *Australia's* reaching London. These instructions were obeyed: the *Cumberland* not having arrived at the expiration of the prescribed period, the letter was delivered to the plaintiff, who thereupon handed the letter to their broker, desiring him to effect the insurance, which he accordingly did with the *Indemnity Insurance Company*, whom the defendant represented. But he read to the company's manager that part of the letter only which contained the instruction to insure, the nature of the goods and the time of their sailing.

At the trial it was contended that the other circumstances respecting the mode in which the letter was conveyed to England, and the time it had remained there, were material, and ought to have been communicated, and that their suppression vitiated the policy: and several underwriters were called, who deposed that, in their opinion, the whole of the letter ought to have been communicated, and that the parts suppressed were material. This evidence was objected to, but admitted; and, on a motion for a new trial, after a verdict for the defendant, Lord Tenterden, delivering the judgment of the court, said, "Several witnesses were examined, who stated that they thought the letter material; but it has been contended that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry."

This opinion seems to be embraced by the Court of Common Pleas, in *Chapman v. Walton*, 10 Bing. 57. In that case the defendant, who was a broker, had effected policies for Richardson, in which the voyage was described to be "at and from *London* to *St. Thomas*, with leave to call at *Madeira* and *Teneriffe*." Richardson afterwards received a letter from his supercargo, who stated that he intended to sail the next

day "*for the Canaries*," and thence to one or more of the West Indian Islands, say *Barbadoes*, *St. Kitt's*, and *St. Thomas*, where he was told that he should be able to dispose of the part of his cargo unsold "*in the Canaries*." With respect to linens, he said he had no fear, "*as in Canary any reasonable quantity is desirable*." This letter Richardson handed to the defendant, telling him "that the voyage was altered, and that he left him to do the needful with it." The defendant got the policies altered, by adding leave to proceed to *St. Kitt's* and *Barbadoes* for all purposes. The vessel was lost at the *Grand Canary Island*. Actions were brought on the policies, which turned out unsuccessful on account of the voyage not being covered by the alterations, and this action was brought by the assignees of Richardson, who had become a bankrupt, against the defendant, for negligence in not having procured the proper alterations to be made. The plaintiffs contended that it was the defendant's duty to have procured the insertion of "*liberty to proceed or touch at any of the Canary Islands*." The defendant's counsel, on the other hand, called several policy-brokers, and putting into their hands the policies, the bills of lading, and invoices of the goods, and the supercargo's letter, asked them *what alterations of the policies a skilful insurance broker ought, in their*

judgment, to have procured, having these documents in his possession, and being instructed to do the needful. To which question they replied, that they thought he would do ample justice by procuring the alterations as made. The jury having found for the defendant, the court discharged a rule for a new trial, moved on the ground that this evidence had been improperly admitted. "It is objected," said the Lord Chief Justice, delivering the judgment of the court, "that to allow this question to be put to the witnesses is, in effect and substance, to allow them to be asked, what is the meaning of the letter?—that is, to ask them whether the letter told the defendant that the vessel was going to the Canaries, whereas the letter ought to be allowed to speak for itself, or, if there were any doubt upon the meaning, it ought to be determined by the court and jury, and not by the evidence of insurance-brokers, or any other witnesses. It may be admitted that, if such were the real nature of the question, the evidence offered would have been inadmissible. . . . But it is not a simple abstract question, as supposed by the plaintiffs, what the words of the letter mean? it is what others conversant with the business of a policy-broker would have understood it to mean, and how they would have acted upon it under the same circumstances. The time of year at which the voyage is

performed—the nature of the cargo on board—the objects of the voyage, as disclosed in the letter—above all, the circumstances that the original voyage described in the policy itself comprehended Teneriffe, the greatest and most important of the Canary Islands, would all operate in the minds of experienced men in determining whether it was intended that the alteration should include a liberty to touch and stay at the Canaries in general; and this conclusion it appears to us, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence, because they would not have the experience upon which a judgment could be formed. The decision in this case appears to be consistent with the principle laid down by Mr. Justice Holroyd, in *Berthon v. Loughman*, 2 Star. N. P. 258, that a witness conversant with the subject of insurance might give his opinion, as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium—a principle which has been confirmed by the later case of *Rickards v. Murdock*, 10 B. & C. 527: and it is difficult to reconcile the opinion given by Lord Chief Justice Gibbs, in the case of *Durrell v. Bederley*, Holt, N. P. C. 283, with the judgment of the Court of King's Bench in the case last above referred to. We think, therefore, both on principle, and on the authority of the

decided cases, the evidence was properly admitted."

It is remarkable that the above case, which was decided in Trinity Term, 1833, and contains a recognition of the opinion of the King's Bench in *Rickards v. Murdock*, should not have been alluded to in any stage of *Campbell v. Rickards*, 5 B. & Ad. 840, decided in the Michaelmas Term of the same year. *Campbell v. Rickards* arose out of the same transaction as *Rickards v. Murdock*. The action brought against the insurance-office, having, as we have seen, failed in consequence of the suppression by the broker, who was employed by *Rickards & Co.* to effect the policy, *Campbell*, the merchant of Sydney, upon whose goods the policy had been effected, brought this action against *Rickards & Co.*, to recover compensation for the loss which he had sustained by their negligence in not taking care that the policy effected should be valid. At the trial, several brokers and underwriters were called for the plaintiff, and the same letter which was produced in *Rickards v. Murdock* being put into their hands, they were asked, "*whether it was material to have communicated the fact that that letter had arrived in this country thirty days before effecting this insurance?*" The answer was, that it was material. The jury having found a verdict for the plaintiff, and a new trial being moved for, on the ground

that the evidence had been improperly admitted, the rule was made absolute. The Lord Chief Justice Denman delivering the judgment of the court, referred to the opinion of Lord Mansfield in *Carter v. Boehm*, and that of Chief Justice Gibbs in *Durrell v. Bederley*. "In some more recent cases," continued his lordship, "such questions have certainly been proposed to witnesses, but they have passed without objection, and it may be observed that the answers will often imply no more than scientific witnesses may properly state—their opinion on some question of science. This is especially true of medical opinions. In *Rickards v. Murdock*, indeed, out of which the present case arises, this kind of testimony was received. In giving judgment on the motion for a new trial, Lord Tenterden did not expressly defend its admissibility, but his words are in the alternative. 'If such evidence be rejected, the court and jury must decide the point by their own judgment, unassisted by that of others. If they are to decide, all the court agree in thinking the letter was material, and ought to have been communicated, and that a jury would have been bound to come to that conclusion.' Now, this mode of disposing of the question does not appear to the court, on reflection, to be quite correct, but we think that, as the jury are to decide on the materiality of

facts, and the duty of disclosing them, this verdict, founded in some degree on evidence that could not be legally received, ought to be set aside. The rule for a new trial must therefore be made absolute."

Such being the state of the authorities, the question of admissibility can be hardly even now considered as settled; for opposed to the decision of the King's Bench, in *Campbell v. Rickards*, is the opinion of the Judges of that Court in *Rickards v. Murdock*, recognised by the Court of Common Pleas in *Chapman v. Walton*. The difference is, however, perhaps less upon any point of law than on the application of a settled law to certain states of facts; for, on the one hand, it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it; see *Folkes v. Chadd*, 3 Dougl. 157; *R. v. Searle*, 2 M. & M. 75; *Thornton v. R. E. Assurance Co.*, Peake, 25; *Chaurand v. Angerstein*, Peake, 43; *McNaghten's Case*, 10 Cl. & Fin. 200; *Greville v. Chapman*, 5 Q. B. 731; and *Fenwick v. Bell*, 1

Car. & Kir. 312, *Coltman, J.*; but see *Silk v. Brown*, 9 Car. & P. 601, *Coleridge, J.*; while, on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. Now, the question of materiality in an assurance seems one which may possibly happen to fall within either of the above two classes, for, setting out of the question the cases of life-policies, where the medical evidence is unquestionably scientific, and necessary in order to enable the jury to come to a right conclusion, it is submitted that it may happen, even in cases of sea-policies, that a communication, the materiality of which is in question, may be one respecting the importance of which no one except an underwriter can, in all probability, form a correct opinion. If such a case were to occur, it possibly would not be considered as falling within the decision in *Campbell v. Rickards*. In that case the facts concealed were of the very simplest nature; a vessel which sailed after the one insured had arrived thirty-nine days before it, and it was easy, without much experience in the business of an underwriter, to divine the probable fate of the ship insured under those circumstances.

In Mr. Arnould's valuable work

on the law of marine insurance and average, Vol. I. pp. 571—573, the conflicting opinions on the subject of the above note are considered, and the American decisions are stated to be in the same unsettled state as our own. The author marshals the authorities in both countries as follows:— Lord Mansfield in *Carter v. Boehm*; Gibbs, C. J., in *Durrell v. Bedderley*; and Lord Denman in *Campbell v. Rickards*, *supra*, against receiving the evidence; Lord Kenyon in *Chaurand v. Angerstein*; Holroyd, J., in *Berthon v. Loughman*; Lord Tenterden in *Rickards v. Murdock*; and Tindal, C. J., in *Chapman v. Walton*, *supra* (and see *Elton v. Larkins*, 5 C. & B. 392), expressly in favour of its reception; and tacitly so, by receiving and acting upon it without objection, Mansfield, C. J., *Littledale v. Dixon*, 1 N. R. 151;

and Lord Ellenborough, *Haywood v. Rogers*, 4 East, 590. In America there are the opinions of Chancellor Kent, 3 Kent's Com. 284, note (b), edit. 1844; Judge Story, in *McLanahan v. Universal Ins. Co.*, 1 Peters, 188; and Mr. Duer, in his work on Representations, 184—191, note xix, to the same effect. The latter writer has pointed out that the evidence was refused in *Carter v. Boehm*, on account of the *unusual* nature of the risk, namely, the capture of a fort in the East Indies; so that in the language of Lord Mansfield, the evidence was “mere opinion, *without the least foundation from any previous precedent or usage.*” And the author first referred to concludes that the arguments in favour of the admission of the evidence far outweigh those which have been urged against it.

RICE v. SHUTE.

EASTER.—1 GEO. 3, B. R.

[REPORTED BURR, 2611.]

In an action ex contractu, the non-joinder of a co-contractor as defendant can be taken advantage of by plea in abatement only.

THIS was an action brought against one partner only, upon a partnership account.

At the trial (which was before Mr. Justice *Bathurst*,) the defendant gave evidence that there was another partner, named *Cole*, who was not joined in the action, as a defendant; which he ought to have been, as the plaintiff knew the fact to be so.

Whereupon the plaintiff was nonsuited.

Mr. Serjeant *Burland* moved, upon the 5th of this instant May, 1770, on behalf of the plaintiff, to set aside this nonsuit, and to have a new trial.

It appeared upon the Judge's report that the plaintiff could not but know of the partnership: for that all the letters showed, and it was even stated upon the very account itself, "that *Cole* and *Shute* were partners." So that the plaintiff was not surprised by the defendant's producing this evidence of a partnership: on the contrary, he had brought his action in this manner against the present defendant alone, with a deliberate design to take some advantage of him.

The Serjeant's objection was, that this matter could not be given in evidence, but ought to have been pleaded in abatement.

The court gave him a rule to show why the nonsuit should not be set aside, and a new trial had.

Mr. Serjeant *Davy* now, on this 14th of May, showed cause.

He said, it would be very mischievous, if a person having a demand upon a partnership should be left at liberty to cull out one particular partner, and bring an action against him alone, leaving out the rest of the partners.

In the case of *Boson v. Sandford*, 2 Salk. 440, the court held "that all the part-owners of the ship must be joined;" and they gave judgment for the defendant, because all the owners were not joined.

This may undoubtedly be pleaded in abatement: but it is not necessary that in all cases whatsoever it must be pleaded in abatement. In some cases, and under certain circumstances, and particularly where it is within the plaintiff's own knowledge "that there are more partners," it may be given in evidence, without pleading it in abatement.

Here the plaintiff knew that Cole was partner with the defendant. He was not surprised by this evidence: he acted with his eyes open, and with a deliberate design to take an unfair advantage.

If the defendant had pleaded in abatement, he must have shown who his partners were: and then the plaintiff, being thus informed who they were, must have brought a new action against them all. But in the present case the plaintiff already knew, of his own previous knowledge, "who were the partners:" and therefore he was as much obliged to bring his action originally against them all, as he would have been obliged to bring a new action against them all, if he had come at that knowledge only by the defendant's plea in abatement. As soon as he knows who the partners are, he is obliged to bring his action against them all, however he may come at this knowledge. He cannot, after having obtained this knowledge, select one, and omit the rest. Its being pleadable in abatement shows that he cannot admit any one, if in fact

there are more than one. And if he does know it before he brings his action, it is more expeditious and more reasonable, that he should join them all at first.

And though it may have been heretofore holden "that it could not be given in evidence;" yet that was only an opinion at *Nisi Prius*: there never has been any such determination of this court, or any where else in your lordship's time. And if it has been ever holden "that it was sufficient to make the acting partners defendants," the rule has been since established, "that all must be joined if known."

He, therefore, prayed that the nonsuit might be recorded.

Serjeant Burland was proceeding to support his rule: but was stopped by Lord Mansfield, as not being necessary.

Lord Mansfield—

To be sure, a distinction is to be found in the books, between *torts* and *assumpsits*—"that in torts, all the trespassers need not be made parties; but in actions upon contract every partner must be made a defendant." Many nonsuits, much vexation, and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand. But experience shows that convenience, as well as justice, lies the other way. All contracts with partners are joint and several: every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves. A creditor knows with whom he dealt: but he does not know the secret partner. He may be nonsuited twenty times before he learns them all; or driven to a suit in equity, for a discovery, "who they are." It is cruel to turn a creditor round, and make him pay the whole costs of a nonsuit, in favour of a defendant who is certainly liable to pay his whole demand; and who is not injured by another partner's not being made defendant; because, what he pays, he must have credit

for in his account with the partnership. Upon this point, I very early consulted the three other Judges of this Court, Mr. Justice *Denison*, Mr. Justice *Foster*, and Mr. Justice *Wilmot*. They were all of opinion, "that the defendant ought to plead it in abatement:" he then must say "who the partners are." If the defendant does not take advantage of it at the beginning of the suit, and plead it in abatement, it is a waiver of the objection. He ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded in the merits of the cause, but on the form of proceeding. The old cases make no distinction between the plaintiff's knowing of a partnership or not. Here, indeed, the plaintiff knew of it: but the present defendant was the person with whom he transacted. He must be allowed this, in his account with the other partners. No injustice is done to the defendant, by allowing the plaintiff to recover; but great injustice is done to the plaintiff, by allowing the nonsuit to stand; and, what is still worse, a mode of litigation allowed which is highly inconvenient.

Mr. Justice *Aston* concurred.

He said, that as his lordship had gone through the whole, he would not repeat what had been already mentioned: but he observed, that there was no necessity for admitting it to be given in evidence; nor any inconvenience in pleading it in abatement; and the not pleading it in abatement seemed to be a waiver of the objection.

The case in which Mr. Justice *Yates* tried the cause was a contract about wood: but it was never decided here by the court.

He took notice, that, upon a joint bond, the action cannot be brought against one of the obligors only. This was the point of a case in Michaelmas Term, 1750, 24 G. 2, in this court; which was argued by the now Lord *Lifford*; the name of it was *Horner v. Moore*.† (†I have a note of this case. "*Non est factum*" was pleaded: and the jury found it to be the deed of both. Mr. Serjeant *Hewitt* moved in arrest of judgment, upon the face

of the declaration. He acknowledged, that it could not have been moved in arrest of judgment, if it had not appeared upon the face of the declaration: *but it there appeared, that both had sealed the obligation, and both were living. He owned, that if it had not appeared upon the face of the declaration, it must have been averred.* Mr. Ford, who was for the plaintiff, gave it up; and the judgment was arrested.)

Mr. Justice Willes and Mr. Justice Blackstone being both of the same opinion.

The whole court were unanimous that the nonsuit ought to be set aside, and a new trial had.

Rule made absolute.

N.B. There was a case solemnly argued and determined in the Common Pleas upon this point, in Easter Term, 1774, 14 Geo. 3, and they held, upon the authority even of cases in the year-books, "that it should be pleaded in abatement." The name of it was *Abbot v. Smith*. After argument, it stood for the opinion of the court: and Lord Chief Justice *De Grey* afterwards delivered their opinion. He observed, that this was not a novel doctrine or invention; in proof of which he cited Trin. 9 E. 4, 24, b., 10 E. 4, 5, a., *et post*; 36 H. 6, 38; and Brooke, Brief 37. And he took notice, that this case, just now reported (of *Rice v. Shute*), went on the general principle that the court then went upon in the case of *Abbot v. Smith*.

(I was favoured with an account of this case of *Abbot v. Smith*, by a very learned judge of the court in which it was determined.) See 2 Bl. 947, where this case is reported.

ACCORDINGLY it has ever since been held that the non-joinder of a joint-contractor, as defendant in an action *ex contractu*, must, if advantage is to be taken of it at all, be pleaded in abatement. The authorities on this subject are cited, and the subject itself elaborately discussed, in the notes to *Cabell v. Vaughan*, 1 Wms. Saund. 291, where it is remarked that the observation of Mr. J. Aston, respecting joint bonds, is too large, and that he must be understood to have meant that the action cannot be maintained against one

co-obligor, *if the other pleads in abatement*, except indeed in such a case as that of *Moore v. Horner*, as explained by the reporter, where the fact that two persons, both of whom executed the bond, are still living, appears on the face of the record.

There are some cases in which the non-joinder of a joint contractor cannot be taken advantage of in any way whatever. Thus, though it seems to be assumed, in the principal case, that the non-joinder of a secret partner might be ground of a plea in abatement; and was indeed, afterwards, so decided in *Dubois v. Ludert*, 8 Taunt. 9; 1 Marsh. 246; yet that case was soon disregarded in practice and at last solemnly overruled, *Mullet v. Hook*, 1 M. & M. 88; *De Mautort v. Saunders*, 1 B. & Ad. 398; and, therefore, if issue be joined upon a plea in abatement of non-joinder, the jury are directed to consider *with whom had the plaintiff reason to believe that he contracted*. *Bonfield v. Smith*, 12 M. & W. 405, where the judge left it to the jury to say *if the defendant gave the plaintiffs reason to believe that he alone constituted the firm*.

Statute 9 G. 4, c. 14, commonly called Lord Tenterden's Act, and which requires a writing signed to take a debt out of the statute of limitations, further enacts that the written acknowledgment of one joint-contractor shall not charge another, and directs that if non-

joinder of a joint-contractor be pleaded in abatement, and it appear that by reason of the St. 21 Jac. 1, cap. 16, or of that act, no action could be maintained against the person whose non-joinder is pleaded, the issue shall be found against the party pleading such plea.

By stat. 3 & 4 W. 4, c. 42, s. 9, the bankruptcy and certificate, or the discharge under the insolvent acts [since repealed, 24 & 25 Vict. c. 134] of a co-contractor may be replied to a plea of abatement of his non-joinder. And that act throws considerable impediment in the way of such pleas, by enacting, in sec. 8, that no such plea shall be allowed, unless the co-defendant, whose non-joinder is pleaded, be therein stated to be resident within the jurisdiction of the court, and unless the place of his residence be stated with convenient certainty in an affidavit, verifying such plea. The effect of this [has been] to put an end to a very considerable inconvenience; for it was held that where there were two defendants in one action, one of whom resided out of the jurisdiction of the court, and so could not be served with process, it was necessary that he should be outlawed before declaring against the other. Now, however, as the non-joinder of the defendant residing out of the jurisdiction cannot be pleaded in abatement, the plaintiff's course will be to omit him altogether,

and sue the one residing within the jurisdiction; unless he prefers to proceed against the absent defendant under the provisions of the Common Law Procedure Act, 1852. And if one of several co-contractors reside out of the jurisdiction, there can be no plea in abatement for non-joinder of those who are within the jurisdiction, *Joll v. Lord Curzon*, 4 C. B. 249. The affidavit is to state the domicile, or home of the party, and not the spot where he actually is at the time, *Lamb v. Smythe*, 15 M. & W. 433; see *Wheatley v. Golney*, 9 Dowl. 1019. Where it contained a false statement of residence, the plea was set aside, *Newton v. Stewart*, 4 D. & L. 89. And by the 10th section of the same statute, and the [38th and 39th] sections of the Common Law Procedure Amendment Act, 1852, provisions [have been made enabling] the plaintiff, without proceeding to trial, to proceed by amendment in the original action against the original defendant and the person named in the plea in abatement, and imposing in that case upon the defendant pleading in abatement the onus of proving that the person named in his plea was jointly liable with him, and the costs of the proceedings, in case he himself should be proved to be liable, and such person should turn out not to be liable. As to the course of proceeding at the trial, see *Beale v. Moulds*, 1 Car. & K. 1.

By 1 W. 4, c. 69, sec. 5, any

one or more of mail-contractors, stage-coach proprietors, or common carriers, may be sued in his, her, or their name or names only, and no action or suit for damages, for loss or injury to any parcel, package, or person, shall abate for non-joinder of any co-contractor or co-proprietor.

One consequence of the doctrine established in *Rice v. Shute* is that if one joint contractor sued alone, and not pleading in abatement, happens to have a defence grounded on the joint nature of the debt, such, for instance, as a set-off, he may plead in bar, averring the debt to have been joint, *Stackwood v. Dunn*, 3 Q. B. 822; [and *Owen v. Wilkinson*, 5 C. B. N. S. 526, where the set-off was in respect of the joint and several note of the plaintiff and another person]. Another is, that a judgment (though unsatisfied) against one of two joint (not joint and several) debtors, is a bar to an action against the other, *King v. Hoare*, 13 M. & W. 494; [*Ex parte Higgins*, 27 L. J. Bankruptcy Cases, 27; unless he was beyond seas when the cause of action accrued; 19 & 20 Vict. c. 97, s. 11; see as to a judgment in favour of one of several joint contractors, *Phillips v. Ward*, 32 L. J. Exch. 7]. There is a distinction between *scire facias* and other forms of action in this respect: *scire facias* being a proceeding to have execution of a record must follow its terms and include all the defendants, or ac-

count for their omission; but debt on a record stands on the same ground as debt on contract; and the omission of one of the original defendants is not a variance at the trial of an issue upon *nul tiel* record in such an action, *Cocks v. Brewer*, 11 M. & W. 51. A statutory *scire facias*, founded on a judgment against the public officer of a joint-stock company, stands upon quite a different footing, and is not open even to a plea in abatement for non-joinder of other members than the one proceeded against, *Fowler v. Rickerby*, 2 M. & G. 760; 3 Sc. N. R. 138, S. C.

The non-joinder of a person who ought to be *co-plaintiff*, is in the absence of an amendment under the Common Law Procedure Amendment Act, 1852, in an action *ex contractu*, generally speaking, fatal, and will be ground of nonsuit, or if it appears on the record will constitute error: 1 Wms. Saund. 291, f. g. *Halsall v. Griffith*, 2 C. & M. 679; *Slingsby's Case*, 5 Rep. 18 b.; *Lane v. Drinkwater*, 3 Dowl. 223; *Foley v. Adendenbrooke*, 4 Q. B. 197; [*Thompson v. Hakewill*, 35 L. J. C. P. 18]; *Hopkinson v. Lee*, 6 Q. B. 964; *Harold v. Whitaker*, 11 Q. B. 147 (a case of lease by mortgagor and mortgagee); *Sorsbie v. Park*, 12 M. & W. 146; *Bradburne v. Botfield*, 14 M. & W. 559. In actions *ex delicto* it is otherwise; *Sedgworth v. Overend*, 7 T. R. 279; *Addison v. Overend*, 6 T. R. 766; *Wallis v. Harrison*, 5 M. & W.

142; *Phillips v. Claggett*, 10 M. & W. 102, 2 Dowl. N. S. 258, S. C.; *Broadbent v. Ledward*, 11 A. & E. 210, a case of detinue; and even in actions *ex contractu* the non-joinder of a co-executor as plaintiff is not fatal unless taken advantage of by plea in abatement, 1 Wms. Saund. 291 g., 3 T. R. 558; 1 Chitt. R. 71. See *Doe d. Starr v. Wheeler*, 15 M. & W. 633. And even before the Common Law Procedure Amendment Act, efforts were made, especially in the Court of Exchequer, by exercising a liberal power of amendment, to prevent the entire defeat of justice by the non-joinder and misjoinder of parties, *Babe v. Near*, 3 Tyr. 233; *Lakin v. Watson*, 4 Tyr. 839; *Brown v. Fullerton*, 14 M. & W. 778. But the existence of that power was questioned in the other courts, *Roberts v. Bates*, 6 A. & E. 778; and even the Court of Exchequer would not add the name of a fresh defendant without his consent, *Goodchild v. Leadham*, [1 Exch. 707]; 5 D. & L. 383. Nor it seems would such an amendment be allowed in any case, except to save a debt from the operation of the statute of limitations; an object the legitimacy of which was doubted by Pollock, C. B., *Christie v. Bell*, 16 M. & W. 669, and apparently with reason, in the then state of the law; see *Plowden v. Thorpe*, 7 Cl. & Fin. 137; *Thorpe v. Plowden*, 14 M. & W. 526, the effect of the amendment being in fact to make

a new writ not tested of the day it issued. See *Campbell v. Stuart* 7 C. B. 196; [*Clarke v. Smith*, 2 H. & N. 753].

The law has, however, been amended in this respect by the Common Law Procedure Amendment Act, 1852, sections 34 to 39. The 34th section enacts, that "It shall and may be lawful for the court or a judge, at any time *before the trial* of any cause, to order that any person or persons, *not joined as plaintiff or plaintiffs* in such cause, shall be so joined; or that any person or persons, *originally joined as plaintiff or plaintiffs* shall be struck out from such cause, if it shall appear to such court or judge that injustice will not be done by such amendment, and that the person or persons, to be added as aforesaid, consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons, to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been

added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such cause." [See *Langston v. Wetherell*, 27 L. J. Exch. 400; and *La Banca, &c., v. Hamburger*, 2 H. & C. 330, where the bank having sued in its own name, the insertion into the writ of the name of one of its directors, as nominal plaintiff was allowed.]

By the 35th section, "In case it shall appear *at the trial* of any action that there has been a *misjoinder of plaintiffs*, or that *some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined*, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person or persons, such misjoinder or non-joinder may be amended, as a variance, at the trial by any Court of Record holding plea in civil actions, and by any judge sitting at Nisi Prius, or other presiding officer, in like manner as to the mode of amendment, and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances under an act of Parliament passed in the session of Parliament held in the third and fourth years of the reign of his late Majesty King William the

Fourth, intituled 'An Act for the further Amendment of the Law, and the better Advancement of Justice,' if it shall appear to such court or judge, or other presiding officer, that such misjoinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons, to be added as aforesaid, consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons, to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action." [See *Williams v. Groves*, 1 F. & F. 341; in *Blake v. Done*, 31 L. J. Exch. 100, an action of ejectment brought in the name of a *cestui que trust*, the judge at the trial was held right in amending the writ by adding the names of the trustees.]

The 36th section allows the plaintiff upon notice or plea of non-joinder of persons as co-plaintiffs to amend, the defendant being allowed to plead *de novo*. [See Reg. Gen. H. T. 1853, r. 6.]

The 37th section enacts, that "It shall and may be lawful for the court or a judge in the case of the *joinder of too many defendants* in any action on contract, at any time *before the trial* of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge, by whom such amendment is made, shall think proper; and in case it shall appear *at the trial* of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper." See *Robson v. Doyle*, 3 El. & B. 396; *Cowburn v. Waring*, 9 Exch. 207; [*Robinson v. Rudkins*, 26 L. J. Exch. 56; *Mumford v. Griffin*, 1 F. & F. 145; *Cooper v. Sanders*, 1 F. & F. 139. This section does not apply where a defendant who proves not to be liable was joined not by mistake

but intentionally, and with the deliberate purpose of trying to fix him with liability, *Wickens v. Steel*, 2 C. B. N. S. 488; 26 L. J. C. P. 241; *Holden v. Ballantyne*, 29 L. J. Q. B. 148. It seems that the court above have not power to review the decision of a judge at the trial in refusing to allow an amendment, *Ib.*].

By the 38th section, "In any action on contract where the *non-joinder* of any person or persons as a *co-defendant* or *co-defendants* has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration, by adding the name or names of the person or persons named in such plea of abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement: Provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered for all purposes as the commencement of the action."

And lastly, by the 39th section, "In all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement *was or were* jointly liable

with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant or any of the original defendants is or are liable, but that one or more of the persons named in such plea in abatement *is or are not* liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who shall have so pleaded in abatement the non-joinder of such person: Provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement." [See *Casneau v. Morrice*, 25 L. J. Q. B. 126.]

Since the above statute the name of a defendant improperly joined has in numerous instances been struck out, and this may be done even though he or another defendant has suffered judgment by

default, *Greaves v. Humphries*, [4 E. & B. 851, *Johnson v. Goslett*, 18 C. B. 728. The court has no power to add at the trial the name of the defendant's wife as a defendant in an action for a debt contracted by her while a *feme sole*, *Garrard v. Giubilei*, 31 L. J. C. P. 131; explaining *Blake v. Done*, *supra*. The difficulty, which frequently arose, of determining which of two or more persons should be made plaintiff in the action may now be avoided, for by "the Common Law Procedure Act, 1860," 23 & 24 Vict. c. 126, s. 19, "the joinder of *too many plaintiffs* shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover: Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not

given, unless otherwise ordered by the court or a judge." By the 20th section of the same act, "upon the trial of such cause a defendant who has therein pleaded a set-off, may obtain the benefit of his set-off by proving that all the parties named as plaintiffs are indebted to him, notwithstanding one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him." By the 21st section, "no other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action." A declaration, on the face of which it appears that the plaintiffs cannot all of them recover in the action is bad on *demurrer*, notwithstanding the act, *Bellingham v. Clark*, 1 B. & S. 332. In *Stub v. Stub*, 31 L. J. Exch. 510, where two had sued as executors, and at the trial it turned out one was executor, but not sole executor, and the other not executor at all, Baron Bramwell appears to have held that the 19th section did not apply.]

KEECH v. HALL.

MICH.—19 GEO. 3.

[REPORTED, DOUGL. 21.]

A mortgagee may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee.

EJECTMENT tried at Guildhall before *Buller*, Justice, and verdict for the plaintiff. After a motion for a new trial or leave to enter upon judgment of nonsuit, and cause shown, the court took time to consider: and now Lord *Mansfield* stated the case, and gave the opinion of the court as follows:

Lord *Mansfield*—This is an ejectment brought for a warehouse in the City, by a mortgagee, against a lessee under a lease in writing for seven years, made *after the date of the mortgage*, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was *no notice* to quit: so that, though the written lease should be bad, if the lessee is to be considered as tenant from *year to year*, the plaintiff must fail in this action. The question, therefore, for the court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest, and the former keep possession, the mortgagee has given an

implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (*Belcher v. Collins*); but *there the mortgagee was privy to the lease*, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The [idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration a court of equity must follow, not lead the law. On full consideration we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action (a); but here the question turns upon the agreement between the mortgagor and the mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will* in the *strictest sense*, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because *all is liable to the debt*; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent; to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the

(a) Vide
Cowp. 473.

mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should inquire after and examine the title-deeds. In practice, indeed (especially in the case of great estates), that is not often done, because the tenant relies on the honour of his landlord; but, whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass*, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of *Littleton* is clear. We are all clearly of opinion that the plaintiff is entitled to judgment (a).

The *Solicitor-General* for the defendant.—*Dunning* and *Cowper* for the plaintiff.

The rule discharged.

had been done by Nares, Justice, upon the Oxford Circuit, and afterwards confirmed by this court, in the case of *White v. Hawkins*, viz., not to suffer a lessee under a lease prior to the mortgage to avail himself of such lease on an ejectment by the mortgagee, if he has had notice before the action that the mortgagee did not intend to turn him out of possession. *This doctrine is, however, long since overruled.* See *Roe v. Reade*, 1 T. R. 118; *Doe v. Stople*, 8 T. R. 684.

* [In *Litchfield v. Ready*, 5 Exch. 939, it was held that such action would not lie; but see *Barnett v. Guilford*, 11 Exch. 19.]

(a) When the question was argued at the bar, Lord Mansfield said he entirely approved of what

THE point decided in this case has been since frequently confirmed. See *Doe v. Giles*, 5 Bing. 421; *Doe v. Maisey*, 8 B. & C. 767; *Thunder v. Belcher*, 3 East, 449; *Smartle v. Williams*, 3 Lev. 387; 1 Salk. 245.

In *Doe dem. Rogers v. Cadwallader*, 2 B. & Ad. 473, the wife of the lessor of the plaintiff had become mortgagee of the premises in question, by a deed, dated the 7th of May, 1828. Interest was payable on the 25th of December every year; and had been paid up to the 25th of December, 1830; the demise was on the 1st of July, 1830, and the defendant, who had been let into possession after the mortgage by the mortgagor contended that the action was not maintainable because it was not competent to a mortgagee to treat the mortgagor or his tenants as trespassers, at any time during which their lawful possession had been recognised by him; and that, by receiving the interest of the mortgage-money, on the 25th of December, 1830, he had acknowledged that up to that time the defendant was in lawful possession of the premises; but the court gave judgment for the plaintiff on the ground that the receipt of interest was no recognition of the defendant as a person in lawful possession of the premises. However, in *Doe d. Whittaker v. Hales*, 7 Bing. 322, Austin, having mortgaged the premises to the lessor of the plain-

tiff, let them to the defendant. The mortgagee directed his attorney to apply to Austin for the interest; and the attorney in April, 1830, applied to the defendant for rent to pay the interest, threatened to distrain if it were not paid, and received it three or four times. The learned judge at the trial, and the court in *Banco* afterwards, held that these facts amounted to a recognition that the defendant was lawfully in possession in April, 1830, and consequently that he could not be treated as having been a trespasser on December 25, 1829, the day on which the demise was laid. See *Doe d. Bowman v. Lewis*, 13 M. & W. 241. Lord Tenterden, delivering judgment in *Doe v. Cadwallader*, took some pains to distinguish that case from *Doe d. Whittaker v. Hales*: "there," says his lordship, "the defendant, in order to show that he was not a trespasser on the 25th of December, 1829, proved that in April, 1830, he was in possession of the premises; and that an agent of the lessor of the plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the plaintiff, and received money *eo nomine*, as interest, the defendant being required to pay it instead of rent to the mortgagee." Lord Chief Justice Tindal, after stating these facts, observes, "this, therefore, was a demand made by the agent of the mortgagee, and with full

knowledge of all the circumstances of the parties, namely, that the defendant was tenant to the mortgagor, and not to the lessor of the plaintiff, and if a party employs an agent, who has full knowledge of the circumstances, it must be presumed that the principal has the same knowledge, so that the lessor of the plaintiff, having recognised and availed himself of the possession of the defendant, so late as April, 1830, cannot treat him as a trespasser in 1829. This case is very distinguishable from the present: the evidence in this case was only that the mortgagee had received interest on the money advanced by him for a period covering the 1st of July, 1830, the day of the demise mentioned in the declaration. By so receiving the interest he did not recognise the defendant as a person in lawful possession of the premises, nor did he avail himself of that possession to obtain payment of the interest."

Upon the whole the question whether the mortgagee have recognised the tenant of the mortgagor as *his* tenant appears to be a question more of fact than of law, and probably would be left to the consideration of the jury, provided there were any evidence fit to be submitted to them. And the decision in *Doe v. Cadwallader* seems to establish that mere receipt of interest by the mortgagee, coupled with no other fact whatever, would not be evidence fit to

be left to the jury on the question of recognition. The ruling in *Doe v. Cadwallader*, it must, however, be observed, seems to have been thought too severe by Lord Denman in *Evans v. Elliot*, 9 A. & E. 342, where his lordship remarked that he was by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage, and to lease them out exactly as if his property in them continued. It seems, however, from a prior part of his lordship's judgment, that the three other judges were disposed to adhere to the opinion expressed in *Doe v. Cadwallader*.

When once it has been proved that the mortgagee has recognised the tenant of the mortgagor as *his* tenant, he cannot treat him as a *tortfeasor*, nor if he elect to treat him as a *tortfeasor*, can he maintain any demand against him in which he is charged as a tenant; for *Birch v. Wright*, 1 T. R. 378, clearly establishes that a man cannot be treated at once both as a tenant and a trespasser.

It often happens that there is an express covenant in a mortgage deed, that the mortgagor shall remain in possession of the premises until default in payment of the mortgage-money at a certain period. Up to that period he

seems to hold an interest in the nature of a term of years; and, of course, during that period he has a right to the possession, and could not be legally ejected; *Wilkinson v. Hall*, 3 Bing. N. C. 533; the stipulation that he shall remain in possession operating as a redemise. When that fixed period has expired, he becomes, if the money have not been paid, *tenant at sufferance* to the mortgagee. "We must look," said Best, C. J., delivering judgment in such a case, "at the covenant he has made with the mortgagee, to ascertain what his real situation is. We find, from the deed between the parties, that possession of his estate is secured to him until a certain day, and that, if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee; and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same;" 5 Bing. 427.

And, attending to the distinction between an agreement to be collected from the mortgage deed that the mortgagor shall remain in possession for a *time certain*,

which operates as a redemise, and an agreement that the mortgagee may enter upon, or the mortgagor hold until, a default, the time of which is uncertain, which agreement cannot operate as a redemise *for want of certainty* (Com. Dig. *Estate*, G. 12), the view taken in *Wilkinson v. Hall* seems not to be at variance with the more recent decisions in *Doe d. Roy-lance v. Lightfoot*, 8 M. & W. 564, and *Doe d. Parsley v. Day*, 2 Q. B. 147, though extended too widely in *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. As for *Wheeler v. Montefiore*, 2 Q. B. 133, explained by the Court in *Doe d. Parsley v. Day*, 2 Q. B. 155, it has no bearing upon the question; because the mortgage, in that case, was for a term of years, the mortgagee had never entered, and the action was of *trespass*: which form of action cannot be maintained by a lessee for years before entry; although he may bring an ejectment, because in that proceeding the *right* to the possession only is in question. [*Nota.* In *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; S. C. 20 L. J., Exch. 71; the mortgage does not appear to have been for years or a less estate, and the court was of opinion that the mortgagee could not maintain trespass because he was not *seised* and had not entered. In *Litchfield v. Reaily*, 5 Exch. 939, it was held that he could not after entry maintain trespass for mesne profits

before entry, against the mortgagor's tenant after mortgage. See *Barnett v. Guilford*, 11 Exch. 19; *Harrison v. Blackburn*, 34 L. J. C. P. 109.] In *Doe d. Lyster v. Goldwin*, 2 Q. B. 143, a conveyance was made of the legal estate, by Lyster and his wife, (in whose right he enjoyed the property,) in order "to secure an annuity upon which money had been advanced by the Globe Insurance Office;" and it was in trust, amongst other things, to permit and suffer Mrs. Lyster to receive the rents until default made for sixty days in payment of the annuity; and, no default appearing, it was held that the legal estate remained by way of redemise in Lyster. But, to cite the observation of the court in a subsequent judgment, (*Doe d. Parsley v. Day*, 2 Q. B. 155,) "it may be questionable whether sufficient attention was paid in that case to the point as to the *certainty of the time*: at all events, it was not decided upon any ground that such certainty was immaterial." And it may be further observed, upon *Doe d. Lyster v. Goldwin*, that the nature of the transaction does not appear very distinctly, and the conveyance seems not unlikely to have been simply a demise or assignment of a term to secure the annuity, and so to have admitted of considerations different from those which govern the case of an ordinary mortgage. (See *Jacob v. Milford*, 1 J. & W. 629; *Doe d. Butler v.*

Lord Kensington, 8 Q. B. 429.) In *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553, the proviso was, that if the mortgagor should well and truly pay the principal money and interest on the 25th of March then next, the mortgagee should reconvey, and there were covenants that *after default* the mortgagee might enter, and also *after default* for further assurance. The Court of Exchequer, referring to the passage in Sheppard's Touchstone presently to be stated in full, and observing that it was not brought to the attention of the court in *Wilkinson v. Hall*, held that the estate was in the mortgagee from the time of the *execution of the mortgage*, and that the statute of limitations began to run at that time. In *Doe d. Parsley v. Day*, 2 Q. B. 147, freeholds and leaseholds were conveyed in mortgage with a proviso that upon payment of 550*l.* and interest on the 5th of October then next the conveyance should be void, but in case of non-payment it was to be lawful for the mortgagee, after a month's notice in writing demanding payment, to enter into possession, and to make leases and sell, and there was a covenant by the mortgagee not to sell or lease until after such notice. The Court of Queen's Bench, following the authority of the passage in the Touchstone, referred to by Parke, B., in *Doe d. Roylance v. Lightfoot*, and acceding to the doctrine of that case, came to the conclusion

that, inasmuch as after the day of payment, the time, if any, during which the mortgagor was to hold was not determinate, but altogether uncertain; neither was there any affirmative covenant whatever that he should hold at all; "the covenant, therefore, that the mortgagee shall not *sell* or *lease*, or even if it be construed should not *enter*, until a month's notice, was a covenant only and no lease." The passage in *Shep. Touch.* (8th ed.) 272, referred to in *Doe d. Roylance v. Lightfoot*, was cited at length, and commented upon in the judgment in *Doe d. Parsley v. Day*, as follows:—"If A. do but grant and covenant with B., that B. shall enjoy such a piece of land for twenty years; this is a good lease for twenty years. So, if A. promise to B. to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So, if A. license B. to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other estate upon condition, that if such a thing be or be not done at such a time, that the feoffor, &c., shall re-enter, to the end, that in this case the feoffor, &c., may have the land, and continue in possession until that time, to make a covenant that he shall hold, and take the profits of the land until that time; and this covenant in this case will make a good lease

for that time, if the *uncertainty of the time* whereunto care must be had do not make it void. (Mr. Preston adds, 'The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case.') And therefore, if A. bargain and sell his land to B. on condition to re-enter if he pay him 100*l.*, and B. doth covenant with A. that he will not take the profits until default of payment; or that A. shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease ('for want,' says Mr. Preston, 'of a more formal contract, and also, for want of certainty of time.') And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land until the day of payment of the money; in this case, albeit the time be certain, yet this is no good lease, but a covenant only, ('since,' says Mr. Preston, 'the words are negative only, and not affirmative.') Precisely the same law is laid down in *Powseley v. Blackman*, Cro. Jac. 659; *Evans v. Thomas*, Cro. Jac. 172; *Jemmot v. Cooly*, 1 Lev. 170, S. C.; 1 Saund. 112, b., 1 Sid. 223. 262. 344., Sir T. Raymond, 135, 158; Keb. 784, 915; 2 Keb. 20, 184, 270, 295." It may perhaps be concluded, on this review of the authorities, that in order to make a redemise, there must be an *affirmative* covenant, that the mortgagor shall hold for

a *determinate* time ; and that where either of those elements is wanting, there is no redemise.

A mortgage deed sometimes contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent ; or a power enabling the mortgagee to distrain for interest, by which no tenancy is created. The object of such provisions is generally to further secure the payment of the interest, an object more completely effected by adopting the former than the latter mode of framing the deed ; because, whilst the former makes the mortgagor tenant at will only to the mortgagee, so that his interest may be put an end to by demand of possession, *Doe v. Davies*, 7 Exch. 89, and at the same time creates a rent, properly so called, with all its incident remedies, [*Anderson v. Midland Rail. Co.*, 29 L. J. Q. B. 94 ; see *Jolly v. Arbuthnot*, 4 De. G. & J., 224], the latter mode operates merely by way of personal licence from the mortgagor, and affects his interest only.

The former mode, however, is open to the objection that the tenancy created is at will, and consequently the rent precarious, and to the more practical one that the deed containing it may possibly be held to require a lease stamp. See 18 Jurist, part 2, page 150. The effect of either mode of framing the deed upon the subject of this note, *viz.*, the right of the mortgagee to bring

ejectment, must, in each case, depend upon the terms in which it is framed. In *Doe d. Garrod v. Olley*, 12 A. & E. 481, it was agreed, that the mortgagor, during his occupation of the premises, should pay the mortgagee a *rent* of 50*l.* a-year, with such power of distress as landlords have on common demises, provided that the reservation of rent should not prejudice the mortgagee's right to enter after default in payment of the monies secured or any part thereof. The mortgagee, after the principal had fallen due, distrained for half a year's rent, and upon a subsequent default in payment of rent, the principal still remaining due, he, without any notice to quit, brought an ejectment, and succeeded. Patteson, J., in that case, expressed his opinion that it could not be meant that the 50*l.* should be a rent-charge, because the mortgagor had no estate in him, and that it seemed "as if the relation of landlord and tenant was contemplated, but with liberty for the landlord to treat the tenant as a trespasser at any time after any default." That decision was confirmed and acted on in *Doe d. Snell v. Tom*, 4 Q. B. 615. In *Doe d. Basto v. Cox*, 11 Q. B. 122, the mortgagor agreed to become tenant "henceforth at the will and pleasure of the mortgagee, at the yearly rent of 25*l.* 4*s.* payable quarterly," which agreement was held to create a tenancy at will, not converted into a tenancy from

year to year by occupation for two years and payment of rent. [In *The Metropolitan Counties, &c., Society v. Brown*, 4 H. & N. 428, powers of sale and entry after default on a certain day were given by the mortgage deed, which provided that "to the intent that the mortgagees might have for the recovery of interest on the principal money the same powers of entry and distress as are given to landlords for the recovery of rent in arrear," the mortgagor "did thereby attorn and become tenant from year to year of the premises to the mortgagees at a yearly rent, payable half-yearly. Nevertheless, in the event of any sale under the powers thereinbefore contained," the attornment and tenancy thereby created was, "as regards such portion of the premises as should be sold to be at an end; and that without any previous notice to put an end to the same." This mortgage having been assigned, the assignees after default in payment on the day named, without giving the mortgagor six months' notice to quit, served him with a notice of entry, and on his refusal to give up possession brought an ejectment against him, which action was held maintainable. "The clause of attornment," said Pollock, C. B., "did not create a tenancy from year to year with all its incidents, and looking at the deed in its entirety, the true construction is that the right of entry overrides the other provision,

and therefore, notwithstanding the tenancy thereby created, the mortgagee may re-enter on default of payment of the interest." The majority of the court seem to have been of opinion that such form of mortgage creates a tenancy from year to year, determinable on the part of the mortgagees without notice to quit.]

In the last named four cases, the relation of landlord and tenant appears to have at first existed; but there have been others of a like character, in which a mere personal licence to distrain, or a rent-charge (afterwards merged by the acquisition of the legal estate), has been given to the mortgagee. Thus in *Doe d. Wilkinson v. Goodier*, 10 Q. B. 957, there was a power in the mortgagee to distrain for interest if in arrear twenty-one days, "in like manner as for rent reserved on a lease;" and though the mortgagee had entered and distrained after the day of the demise in ejectment, but for interest due before that day, he was considered not to have recognised the mortgagor as his tenant, and to be entitled to maintain ejectment. In *Freeman v. Edwards*, 2 Exch. 732, the mortgage, which was of copyhold, contained a similar power to distrain for interest; the mortgagee was admitted to the copyholds; the mortgagor became bankrupt, and whilst he still remained in possession, the mortgagee distrained for interest in arrear; for

which act the assignees of the mortgagor sued in trespass. The mortgagee pleaded a justification under the deed, which plea was held bad after verdict. The arguments advanced on either side, and the view taken by the court of the operation of such a power, appear fully in the following passage from the judgment of Parke, B. : [as reported in 17 L. J. Exch. 261]—"The utmost effect that can be given to this deed, is to consider it as operating as a covenant that the mortgagee may seize such goods of the mortgagor as shall be on the premises at the time the distress is made, and treat them as if distrained; such a covenant would not affect any specific goods before seizure, and therefore the goods came to the assignees not subject to any equity. Probably, the argument that the grant operated so as to create a rent-charge, is correct; and if so, the rent-charge continued until the surrender and admittance. But it is not necessary to decide that, for as soon as the grantee of the rent-charge, if it was one, became entitled to the fee simple in possession, the rent-charge was gone, and the covenant ceased to exist as an obligation binding the land. It might, however, still exist as a personal covenant, binding the covenantor, though it would not affect third persons. The argument of the plaintiffs counsel, that the effect of the deed was exhausted by the creation of

the rent, may make this doubtful; and it is not necessary to decide it, for, giving the covenant this effect, it will not make this a good plea. The covenant at most is to be construed as an agreement that all goods belonging to Leedham (the mortgagor) at the time of the distress, and then upon the land, might be seized. This would affect his own goods when seized. Up to the seizure the whole is contingent, and gives no lien on specific goods. Before the distress was made, Leedham became bankrupt; at that time the whole of the goods which were his property, and then upon the land, were contingently liable to be seized, but no specific portion was liable more than the rest. There was, therefore, no lien on any portion of the goods, according to the principle of the decision in *Carvalho v. Burn*. 4 B. & Ad. 382. (1 A. & E. 883.) Then at the moment of the distress the goods had ceased to belong to Leedham, and became the property of the assignees, and, as goods not belonging to the covenantor, were not subject to the covenant." See also *Chapman v. Beecham*, 3 Q. B. 723.

In *Walker v. Giles*, 6 C. B. 662, where a conveyance to the trustees of a building society, to secure payment of subscriptions, contained a clause whereby the mortgagor agreed to become tenant to the trustees of the premises, thenceforth "during their will, at the net yearly rent of 200*l.*, pay-

able on the usual quarter days ;" the Court of Common Pleas held that there was no tenancy, the general scope of the deed being inconsistent with such a construction, since, if there was a tenancy, the mortgag[or] might be called upon to pay both the subscriptions and the rent. This case seems, however, open to the animadversion which it has called forth in the 13 Jurist, part 2, p. 463, and 17 Jurist, part 2, p. 149 ; and the court appears to have disregarded the express intention of the parties, in order to avoid the fancied injustice of the trustee having the power (subject to the control of a court of equity) to recover their debt twice over, in other words, to treat the rent as a security for payment of the subscriptions. And in the more recent case of *Pinhorn v. Souster*, 8 Exch. 763, where the deed more fully, though scarcely more clearly than in *Walker v. Giles*, expressed the intention that a tenancy at will should be created, and stipulated that the mortgagee should apply the rent in satisfaction of the rent due from the mortgagor to his superior landlord, and in satisfaction of the principal and interest, and pay the surplus, if any, to the mortgagor, the Court of Exchequer held that a tenancy at will was created, in respect of which the mortgagor might distrain ; and further, that such tenancy was not put an end to by assignment

of the mortgagor's interest without notice to the mortgagee.

[In *Brown v. The Metropolitan, &c., Society*, Q. B. 30th April, 1859, 28 L. J. Q. B. 236 ; S. C. 1 El. & El. 832 ; the court expressed an opinion that *Walker v. Giles* could only be supported, if at all, on the ground, pointed out by Lord Wensleydale in *Pinhorn v. Souster*, that the tenancy and power of distress were inconsistent with the other provisions of the deed. See also *Turner v. Barnes* ; 2 B. & S. 435 ; 31 L. J. Q. B. 170. A personal licence to distrain should seem not to be transferable, and the assignee of the mortgage could not justify a seizure under it as servant of the mortgagee. (See *Brown v. The Metropolitan, &c., Society*.)

Another mode of securing the mortgagor's possession of the mortgaged premises is to make him tenant of them to a third person appointed by him and the mortgagee to receive the rents of the premises. This was done in *Jolly v. Arbuthnot*, 4 De G. & J. 224. In that case, a deed, executed at the same time as the mortgage, and made between the mortgagor, mortgagee, and Aplin, after reciting that it was agreed that, for the purpose of securing payment of the interest, and providing a fund for repayment of the principal, the mortgagor should attorn as tenant to Aplin, it was witnessed that the mort-

gagor and mortgagee in pursuance of the agreement constituted Aplin receiver of the rents and profits of the premises, with powers of entry and distress, and that the mortgagor attorned to Aplin and became his tenant from year to year; provided that, on default in payment, the mortgagee might enter, and avoid the tenancy created by the attornment, and that nothing contained in the deed should abridge his rights or powers under the mortgage. After execution of this deed, and after default in payment on the appointed day of the principal sum secured by the mortgage, the mortgagor was adjudicated a bankrupt, and thereupon Aplin distrained on his goods on the premises for a year's rent. The chief question was, which of the two parties—the mortgagee, or the assignees in bankruptcy of the mortgagor—was entitled to the proceeds of this distress. The M. R. decided in favour of the assignees, holding that the relation of landlord and tenant did not exist between the bankrupt and the receiver, for, as the receivership deed recited the true state of the title, it could not by estoppel constitute that relation. It seems, however, that his Honour, in referring to *Dancer v. Hastings*, 4 Bing. 34, (in which a demise by a receiver appointed by the Court of Chancery was determined to be a good lease to en-

title him to distrain and to estop the tenant from denying the tenancy,) did not notice the report of that case in 12 B. Moore, 2, which report shows that there the lease, setting out the title of the lessor as receiver appointed by the court, disclosed the fact that he had no interest in the land. Against this decision of the M. R. the mortgagee appealed, and the appeal was allowed by Lord Chelmsford, C. The judgment on appeal contains a learned review of the authorities upon the subject. The Lord Chancellor held that the circumstance of the truth of the case appearing on the deed, was a reason why the agreement of the parties should be carried out, either by giving effect to their intentions in the manner prescribed, or by way of estoppel to prevent their denying the right to do the acts which they had authorised to be done; and that even if the creation of the tenancy did not admit the scintilla of a reversion to which the right of distress might be annexed, yet there was nothing in such cases to prevent the power from being exercised, although there might be no reversion in the person to whom the attornment is made. See also *Evans v. Matthias*, 7 E. & B. 590.]

With respect to the nature of the mortgagor's possession after the mortgage, where there is no stipulation that he should be al-

lowed to remain in possession for any certain time, there seems to be more difficulty. Messrs. Coote and Morley, in an elaborate note to Watkins on Conveyancing, deliver it as their opinion, that "if there be no express agreement originally as to the period of possession, and the mortgagor, being the occupant, remain in possession *with the consent* of the mortgagee, it seems that, in such a case, he ought to be considered strictly as tenant at will." This is true, if it be admitted that he has remained in possession *with the consent of the mortgagee*. But the more difficult question seems to be under what circumstances shall the mortgagee's consent be taken to exist, and shall it be implied merely from the fact of his abstaining from ousting the mortgagor immediately after the execution of the mortgage? Certainly neither the case of *Thunder dem. Weaver v. Belcher*, 3 East, 450; nor that of *Smartle v. Williams*, 1 Salk. 246; 3 Lev. 387, which are cited by Messrs. Coote and Morley, have any tendency in favour of such an implication; for, in the former, ejectment was brought against a tenant let into possession by the mortgagor after the mortgage; and, as there had been no recognition of him by the mortgagee, there was judgment against him; and so far was the court from considering that the mortgagor would, under the circumstances above supposed, have been tenant at will, had he remained himself in possession instead of letting, that Lord Ellenborough says, "A mortgagor is no more than a *tenant at sufferance*, not entitled to any notice to quit; and one tenant at sufferance cannot make another." In *Smartle v. Williams* the mortgagor certainly remained in possession, and that with the *express consent* of the mortgagee, for Holt, C. J., says: "Upon executing the deed of mortgage, the mortgagor, *by the covenant to enjoy till default of payment*, is tenant at will." But in that case the mortgagee had assigned the mortgage; and the question was, whether, by doing so, he had determined his will, and whether the mortgagor's subsequent continuance in possession divested the estate of the assignee, and turned it to a right so as to prevent a person to whom the assignee afterwards assigned, and who brought the ejectment, from taking any legal interest; upon which point the court held that it had no such effect, since the mortgagor was, at all events, *tenant at sufferance* after the assignment. And it is not believed that there exists any *decision* in which a mortgagor remaining in possession, after an absolute conveyance away of his estate, by way of mortgage, without any consent on the part of the mortgagee, express or to be implied otherwise than

from his silence, has been considered in any other light than as *tenant at sufferance*, to the definition of whom he seems strictly to answer, being a person who *comes in by right, and holds over without right*: see Co. Litt. 57, and Lord Hale's MSS., note 5, where the following case is put, which seems analogous:—"If tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election."

This subject has been treated at some length, because the reader will find it often *said* that a mortgagor in possession is *tenant at will quodammodo*; an idea which Lord Mansfield especially seems to have countenanced, for in the principal case he says, "when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will*, in the strictest sense: and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt:" and in *Moss v. Gallimore*, which will be printed in this collection, he calls the mortgagor "tenant at will *quodammodo*." Whereas Lord Ellenborough, in *Thunder v. Belcher*, denominated him "tenant at sufferance;" and it is submitted that it would be more convenient to range his possession under some one of the

ancient and well-known descriptions of tenancy than to invent the new and anomalous class of *tenants at will quodammodo*, for the only purpose of including it. See Litt. sec. 381. ["A mortgagor is not in all respects a mere bailiff, he is much like a bailiff; he is not a mere tenant at will; in fact, he can be described merely by saying he is a mortgagor." Per Parke, B., *Litchfield v. Ready*, 20 L. J. Exch. 51; and see the judgment in *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Powell v. Allen*, 4 Kay & J. 343; *Thorp v. Facey*, 35 L. J. C. P. 349.]

Upon the whole it is concluded, 1st. That, if there be in the mortgage-deed an agreement that the mortgagor shall continue in possession till default of payment on a certain day, he is in the mean while termor of the intervening term. 2ndly. That if default be made on that day, he becomes tenant at sufferance. 3rdly. That when there is no such agreement, he is tenant at sufferance immediately upon the execution of the mortgage, unless the mortgagee expressly or impliedly consented to his remaining in possession. 4thly. That such consent renders him tenant at will. 5thly. That if in any of the last three cases he let in tenants, they may be treated by the mortgagee, if he think proper, as *tort feasers*. 6thly. That, if the mortgagee recognise their possession, they become *his*

tenants. Lastly, that the mere receipt of interest from the mortgagor does not amount to such a recognition. These two last propositions must, however, now be taken subject to the doubts expressed in *Evans v. Elliot*.

The relation between mortgagor and mortgagee with reference more especially to proceedings for the recovery of rents from the tenants of the land, is further considered in the note to *Moss v. Gallimore*, post, p. 562.

WIGGLESWORTH v. DALLISON.

TRINITY.—19 GEO. 3.

[REPORTED DOUGL. 201.]

A custom that the tenant, whether by parol or deed, shall have the way-going crop, after the expiration of his term, is good, if not repugnant to the lease by which he holds.

THIS was an action of trespass for mowing, carrying away, and converting to the defendant's own use, the corn of the plaintiff, growing in a field called *Hibaldstow Leys*, in the parish of *Hibaldstow*, in the county of *Lincoln*. The defendant *Dallison* pleaded *liberum tenementum*, and the other defendant justified as his servant. The plaintiff replied, that true it was that the *locus in quo* was the close, soil, and freehold of *Dallison*; but, after stating that one *Isabella Dallison*, deceased, being tenant for life, and *Dallison*, the reversioner in fee, made a lease on the 2nd of March, 1753, by which the said *Isabella* demised, and the said *Dallison* confirmed, the said close to the plaintiff, his executors, administrators, and assigns, for twenty-one years, to be computed from the 1st of May, 1755, and that the plaintiff, by virtue thereof, entered and continued in possession till the end of the said term of twenty-one years,—he pleaded a custom in the following words, *viz.*, “That, within the parish of *Hibaldstow*, there now is, and, from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the

And where entitled by custom to the way-going crop, he keeping the fences in repair, the possession remains in the tenant. See *Griffiths v. Puleston*, 13 M. & W. 359.

first day of May in any year, hath been used and accustomed, and of right ought, to have, take, and enjoy, to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped and taken away, his way-going crop, that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant upon any part of such lands, not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." He then stated that, in the year 1775, he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time lawfully possessed of the said corn, as his absolute property, by virtue of the custom. The defendant, in his rejoinder, denied the existence of any such custom, and concluded to the contrary. The cause was tried before *Eyre*, Baron, at the last assizes for *Lincolnshire*, when the jury found the custom in the words of the replication.

Baldwin moved, in arrest of judgment, that such a custom was repugnant to the terms of the deed, and therefore, though it might be good in respect to parol leases, could not have a legal existence in the case of leases by deed. He relied on *Trumper v. Carwardine*, before *Yates*, Justice (a), the circumstances of which case were these:

(a) At the summer assizes for *Herefordshire*, 1769.

"The plaintiff had been lessee under the corporation of *Hereford* for a term of twenty-one years, which expired on the 4th of December, 1767. In the lease there was no

covenant that the tenant should have his off-going crop. In the seed-time, before the expiration of the term, he sowed the fallow with wheat. The succeeding tenant obstructed him in cutting the wheat when it became ripe, and cut and housed it himself, for his own use. Upon this the plaintiff brought an action on the case, and declared on a custom in *Herefordshire* for tenants to quit their farms at Christmas or Candlemas to reap the corn sown the preceding autumn. *Yates*, Justice, held that the custom could not legally extend to lessees by deed, though it might prevail, by implication, in the case of parol agreements. That, in the case of a lease by deed, both parties are bound by the express agreements contained in it, as that the term shall expire at such a day, &c.; and, therefore, all implication is taken away. That, if such a custom could be set up, the Statute of Frauds would be thereby superseded in *Herefordshire* (a). Accordingly the plaintiff did not recover on the custom, although on another count in trover, in the same declaration, he had a verdict."

A rule to show cause was granted.

The case was argued on Tuesday, the 8th of June, by *Hill*, Serjeant, *Chambre* and *Dayrell*, for the plaintiff, and *Cust*, *Baldwin*, *Balguy*, and *Gough*, for the defendants; when three objections were made on the part of the defendants, viz.: 1. That the custom was unreasonable. 2. That it was uncertain. 3. That, as had been contended on moving for the rule, it was repugnant to the deed under which the plaintiff had held.

For the plaintiff it was argued. 1. That it was not an unreasonable custom, because, without an express agreement, or such a custom as this, there could be no crop the last year of a term, for the tenant would not sow if he could not reap, and the landlord would not have a right to enter till the expiration of the term. That it was for the advantage of the public as much as customs for turning a plough or drying nets, on another person's land, which had been held to be good (b). That it bore a great analogy to the right of emblements, and was founded on

(a) *Qu.* This argument seems more applicable to parol leases, because, if a parol lease for three years could be extended in some degree for half a year longer by such a custom, it might be said that this would be repugnant to the Statute of Frauds.

(b) *Vide* Davis, 32 b.

the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one ; not to the landlord, because without it his land must be unemployed and unproductive for a whole season ; nor to the succeeding tenant, because he would have his turn at the end of his term. 2. That it was sufficiently certain, by the reference to the residue of the lands not sown, and to the course and usage of husbandry in the parish. This is as much certainty as the nature of the subject will admit of ; for, if it had been that so many acres might be sown and reaped, that would have been incompatible with those variations in the proportion of ploughed land, which arise, at different times, from circumstances in the course of cultivation and husbandry. Reasonable is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them ; as with regard to customary fines paid to the lord of a manor, estovers prescribed for by a party to be taken for the use of his house, &c. In the case of *Bennington v. Taylor*, reported in *Lutwyche* (a), where the defendant, in an action of trespass, had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land near every stall in a fair, and, on a motion in arrest of judgment, it was objected, that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the court held it to be certain enough, because the quantity was to be ascertained by the common usage of the fair. In all such cases, whether the quantity or amount is in truth reasonable or not, is for the jury to decide. 3. That the circumstance of the plaintiff's lease in this case having been by deed, made no difference. There was no agreement contained in the deed, that the defendant would depart from the custom, although the parties must have known of it when the lease was executed. He did not claim under any parol contract express or implied ; and, therefore, the argument of repugnancy did not apply ; and the *Nisi Prius* case which had been cited, went upon mistaken reasoning. *Hill*, Serjeant, admitted, that he knew of no instance in the

(a) C. B., E. or
T. 12 W. 3.
2 Lutw. 1517,
1519.

Reports, of a similar custom to this, in the case of freehold property; but he said that there were several with regard to copyholds that went much farther; and he cited *Eastcourt v. Weekes* (a), where a custom, that the executors and administrators of every customary tenant for life, if he should die between Christmas and Lady-day, should hold over till the Michaelmas following, is stated on the pleadings (b); and no objection taken to it on the argument of the case.

For the defendant were cited, *Grantham v. Hawley* (c); *White v. Sayer* (d), in which last case a custom for a lord of a manor "to have common of pasture in all the lands of his tenants for life or years," which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, and different from a prescription to have a heriot from every lessee for life, because that is only collateral (e). A case relied on by *Houghton*, Justice, in *White v. Sayer* (f), in which he said the court had decided that a custom for lessees for years to have half a year after the end of their term, to remove their utensils, was void, as being against law; *Startup v. Dodderidge* (g), where the court refused to grant a prohibition, on the suggestion of a *modus* "to pay, upon request, at the rate of two shillings for every pound of the improved yearly rent or value of the land," because the yearly rent or value was variable and uncertain; *Nailor, qui tam, v. Scott* (h), where a custom having been found by a jury, "that every housekeeper in the parish of *Wakefield* having a child born there, should, at the time when the mother was churched, or at the usual time after her delivery when she should be churched, pay tenpence to the vicar," the court, on a motion in arrest of judgment, determined that the custom was void, being, 1. Uncertain, because the usual time for women to be churched was not alleged (i); 2. Unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she removed from the parish, or died before the time of churching: *Carleton*

(a) T. 10 W. 3.
1 Lutw. 794,
801.

(b) It is found by the special verdict, the action being ejection.

(c) T. 13 Jac. 1 Hob. 132. That case, if at all applicable, seems to me to make for the plaintiff. It is curious in one respect, viz., that the question was brought on in an action of debt on a common bond conditioned for the payment of 20*l.* to the plaintiff if a certain crop of corn did of right belong to him; or, in other words, if the question of law was in his favour.

(d) B. R. M. 19 Jac. 1 Palm. 211.

(e) Cites 21 H. 7. 14.

(f) B. R. M. 19 Jac. 1 Palm. 211.

(g) E. 4 Ann. 2 Ld. Raym. 1158; 2 Salk. 657; 1 Mod. 60.

(h) E. 2 G. 2. 2 Ld. Raym. 1558.

(i) In that case the custom, as suggested, did not refer to the usage of the parish.

(a) Canc. T.
1728. 2 P. W.
462.

(b) T. 1724.
Bunb. 174.

(c) B. R. E.
18 G. 2, 2 Str.
1224

(d) B. R. H.
37 El. Cro.
Eliz. 460 ;
5 Co. 116.

(e) H. 3 Ed. 6.
Moore 8 pl. 27.

(f) C. B. M.
18 G. 3. Since
reported in 2
Blackst. 1171.

v. *Brightwell* (a), where the defendant, on a bill of tithes, set up a *modus* that "the inhabitants of such a tenement, with the lands usually enjoyed therewith, should pay such a sum for tithe corn," and it was held by the Master of the Rolls to be void for uncertainty; *Harrison v. Sharp* (b), where a *modus* that, "when any of the inclosed pastures in a certain vill were ploughed and sown with corn or grain of any kind, or laid for meadow, and mown and made into hay, tithes in kind were paid to the rector, but when eaten and depastured, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after Michaelmas yearly," was held void, on the authority of *Startup v. Dodderidge*; *Wilkes v. Broadbent* (c), where the Court of Common Pleas, and afterwards, on error brought, the Court of King's Bench, held a custom found by verdict, "for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on the land near such pits, such land being customary tenement and part of the manor, there to continue, and to lay and continue wood there for the necessary use of the pits, and to take coals so laid, away in carts, and to burn and make into cinders coals laid there, at their pleasure," to be void, because among other reasons, the word *near* was too vague and uncertain; *Oland v. Burdwick* (d), where a *feme* copyholder *durante viduitate*, having sowed the land, and then married, it was determined that the lord should have the corn, upon the principle, that when the interest in land is determined by the act of the party, he shall not have the crop: an anonymous case in *Moore* (e), where it was held, that a custom, "that lessee for years should hold for half a year over his term," was bad; *Roe, lessee of Bree v. Lees* (f), where, in an ejectment to recover a farm of about sixty acres, of which fifty-one were inclosed, and nine lay in certain open fields, a special case was reserved, which stated a custom, "that when a tenant took a farm, in which there was any open field, more or less for an uncertain term, it was considered as a holding from three years to three years;" and though

the court decided against the custom on other grounds, yet, by their reasoning, it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of 100 acres of land inclosed. Besides the above authorities (a), the case before *Yates*, Justice, was much relied on. It was admitted, that, in cases where the usual crop of the country is such, that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parole demise, may be raised by implication; as where saffron is cultivated, in *Cambridgeshire*; liquorice, near *Pontefract*; or tobacco, which formerly used to be planted in *Lincolnshire*; but it was contended, that, in such cases, a lease by deed would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure in the written instrument. Such a custom as that set up, in the present case, could not, it was said, be of sufficient antiquity with respect to leases by deed, as, in the time of Richard I., and long afterwards, tenants had no permanent interest in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have applied to the 1st of May, old style, and this lease was made and commenced after the alteration was introduced by 24 Geo. 2, c. 23 (b).

The court took time to consider; and this day, Lord *Mansfield* delivered their opinion as follows:

Lord *Mansfield*.—We have thought of this case, and we are all of opinion, that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap (c). But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom

(a) 4 Co. 51 b. 1 Roll. Abr. 563, pl. 9, et Co. Litt. 55, were also cited for the general principles concerning customs and emblements.

(b) The new style commenced the 1st of January, 1753. But if this argument were admitted in its full extent, no custom could exist where a certain day of the month made part of it, as, from the errors in the former method of computation, the nominal day was continually deviating, by degrees, from the natural day. (c) [See 14 & 15 Vict. c. 25, s. 1, giving the tenant in lieu of emblements a right to occupy until the end of the current year of his tenancy.]

(a) *Vide Doe v. Snowden*, C. B. M. 19 Geo. 3, 2 Black. 1225, where it is said by the court, that if there is a taking

does not alter or contradict the agreement in the lease ; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease (a).

The rule discharged (b).

from Old Lady-day (5th April), the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (2nd of February), to prepare for the Lent corn, without any special words for that purpose, *i.e.* in a written agreement for seven years ; for the court were speaking of such an agreement.

(b) Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought, in the Exchequer Chamber, and the defendant assigned for errors, "that the custom contained and set forth, &c., is a custom void in law, and is contrary to and inconsistent with the said indenture of lease in the said replication mentioned." The case was argued at Serjeants' Inn, before the Judges of C. B., and the Barons of the Exchequer, by *Balguy*, for the plaintiff in error, and *Chambre* for the defendant. The objection to the reasonableness of the custom was abandoned. In T. 21 G. (27th June, 1781), Lord *Loughborough* delivered the unanimous opinion of the Court of Exchequer Chamber, that the custom was good, and the judgment was affirmed.

FEW questions are of more frequent practical occurrence than those which involve the admissibility of parol evidence of custom and usage for the purpose of annexing incidents to, or explaining the meaning of, written contracts. In one of the later cases on the subject, the following luminous account of this head of the law was given by Parke, B., delivering the judgment of the Court of Exchequer. 1 M. & W. 474.

"It has been long settled," (said his lordship,) "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed ; and this has been done upon the principle of *presump-*

tion that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. Whether such a relaxation of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted ; but the contrary has been established by such authority, and the relations between landlord and tenant have so long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course ; and it would be productive of much inconvenience if this practice were now to be disturbed. The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves

the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the court should been favourably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties.

"Accordingly, in *Wigglesworth v. Dallison*, afterwards affirmed on a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord Mansfield said the custom did not alter or contradict the lease, but only added something to it.

"The question subsequently came under the consideration of the Court of King's Bench in *Senior v. Armitage*, reported in Mr. Holt's *Nisi Prius Cases*, p. 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenant-right, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that though there was a written contract between landlord and tenant, the custom of the country

would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common law obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the court held the custom to be operative, 'unless the agreement in express terms excluded it;' and probably he has not been quite accurate in attributing a similar opinion to the Lord Chief Baron Thompson, who presided on the second trial. It would appear that the court held that the custom operated, unless it could be collected from the instrument, *either expressly or impliedly*, that the parties did not mean to be governed by it.

"On the second trial, the Lord Chief Baron Thompson held that the custom prevailed; although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour.

"The next reported case on this subject is *Webb v. Plummer*, 2 B. & A. 750; in which there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock

of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn.

The claim was for a customary allowance for *foldage* (a mode of manuring the ground); but the court held, as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of *foldage*, the customary obligation to pay for the latter was excluded. No doubt could exist on that; the language in the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

"The question then is, whether from the terms of the lease now under consideration, it can be collected that the parties meant to exclude customary allowance for seed and labour."

In the case from which the above is extracted, *viz.*, *Hutton v. Warren*, 1 M. & W. 466, a custom by which the tenant, cultivating according to the course of good husbandry, was entitled, on quitting, to receive a reasonable allowance in respect of seed and labour bestowed on the arable land in the last year of his tenancy, and was bound to leave the manure

for the landlord, if he would purchase it, was held not to be excluded by a stipulation in the lease that he would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land, on receiving a reasonable price for it.

From the above luminous judgment of Baron Parke it may be collected, that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent.

1st. In contracts between landlord and tenant.

2nd. In commercial contracts.

3rd. In contracts in other transactions of life, in which known usages have been established and prevailed.

But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced,—

1st. By the express terms of the written instrument.

2nd. By implication therefrom.

With respect to the first class of cases in which the evidence has been received, *viz.*, that of contracts between landlord and tenant, that is so thoroughly discussed in *Hutton v. Warren*, part of the judgment in which is above set

out, and in *Wigglesworth v. Dallison*, the principal case, that it seems unnecessary to say more on that head of the subject. See *Holding v. Pigott*, 7 Bing. 465; *Roberts v. Barker*, 1 C. & M. 803; *Hughes v. Gordon*, 1 Bligh. 287; *Clinan v. Cooke*, 2 Sch. & Lef. 22; *White v. Sayer*, Palm. 211; *Furley v. Wood*, 1 Esp. 198; *Doe v. Benson*, 4 B. & A. 588. Where there is a custom to pay for fallows, &c., and no incoming tenant, there is an implied contract on the part of the landlord to pay according to the custom, *Faviell v. Gaskoin*, 7 Exch. 273. [In *Muncey v. Dennis*, 1 H. & N. 216, a custom of the country binding the incoming tenant to pay the outgoing tenant for straw left on the farm, was held not to be excluded by a provision in the lease to the outgoing tenant that all straw should during the term be consumed, and the manure used, on the premises. A custom not of the country, but prevalent between the owner and tenants of a particular landed estate, is not binding on a tenant who becomes such without notice of its existence: *Womersley v. Dally*, 26 L. J. Exch. 219.]

With respect to contracts commercial, it has been long established that evidence of a *usage of trade* applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing

terms into the contract respecting which the written instrument is silent. The words "*usage of trade*" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles, and analogies, not from evidence *in pais*, and the knowledge of which resides in the breasts of the judges. (See *Vallejo v. Wheeler*, Lofft. 631; *Eden v. E. I. Company*, 1 Wm. Black. 299, 2 Burr. 1216; [*Brandao v. Barnett*, 3 C. B. 519, 530; *Suse v. Pompe*, 8 C. B. N. S. 86;] *sed vide Haille v. Smith*, 1 B. & P. 563, in which evidence of the general custom of merchants was received.) This distinction, indeed, between the general custom of merchants, which is part of the law of the realm, and the particular usages of certain particular businesses, was not, it seems, so clearly marked in former times as it is now; thus we find Buller, Justice, saying, 2 T. R. p. 73, that "within the last thirty years (his lordship spoke in 1787) the commercial law of this country has taken a very different turn from what it did before. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and produced no established principle. From

that time we all know the great study has been to find some certain general principles which shall be known to all mankind; not only to rule the particular case then under consideration, but to serve as a guide for the future."

But with regard to particular *commercial usages*, evidence of them is admissible either to ingraft terms into the contract, as in those cases concerning the time for which the underwriters' liability in respect of the goods shall continue after the arrival of the ship, *Noble v. Kennaway*, Dougl. 510, and see the observations on this case in *Ougier v. Jennings*, 1 Camp. 503, n.; *Moon v. Guardians of Witney Union*, 3 Bing. N. C. 817; or to explain its terms, as was done in *Udhe v. Walters*, 3 Camp. 16, by showing that the Gulf of Finland, though not so treated by geographers, is considered by mercantile men part of the Baltic, and in *Hutchinson v. Bowker*, 5 M. & W. 535, where it was proved that *good* barley and *fine* barley signified in mercantile usage different things. So in *Brown v. Byrne*, 3 E. & B. 703, a case very elaborately argued at the bar, a bill of lading which made the goods deliverable at Liverpool to order or assigns, "he or they paying freight for the said goods five-eighths of a penny per pound, with 5 per cent. primage and average accustomed," was held not to exclude the operation of a custom in the trade at Liver-

pool, by which three months' discount was deducted from bill of lading freights of goods coming from, amongst others, the port of shipment. In the marginal note, the court are said to have held that this custom controlled the bill of lading; perhaps it would be better to have said that it was not inconsistent with it. [See *Lucas v. Bristowe*, E. B. & E. 907;] In a modern case in the Exchequer, [*Cuthbert v. Cumming*, 10 Exch. 809; affirmed 11 Exch. 405,] that of *Brown v. Byrne* was approved of. [See also *Falkner v. Earle*, 32 L. J. Q. B. 124; in *Field v. Lelean*, Exch. Cham. 6 H. & N. 617; 30 L. J. Exch. 168, evidence of a usage amongst brokers that on the sales of mining shares the seller is not bound to deliver without contemporaneous payment, was held admissible to show that the defendant was not entitled to have the shares which he had bought from the plaintiff delivered to him before payment, although by the bought and sold notes payment of the price was to be made, half in two, half in four months, and nothing was there said as to the time of delivery. This case goes beyond any other, but it can be questioned in Dom. Proc. only. Upon the question whether this case overrules *Spartali v. Benecke*, 10 C. B. 312, see the judgment of Williams, J., in *Field v. Lelean*. See also *Godts v. Rose*, 17 C. B. 229.] See further *Robertson v.*

Clarke, 1 Bing. 445; *Bottomley v. Forbes*, 5 Bing. N. C. 123; *Moxon v. Atkins*, 3 Camp. 200; *Vallance v. Dewar*, 1 Camp. 403, *et notas*; *Cochran v. Retburg*, 3 Esp. 121; *Birch v. Depeyster*, 1 Stark. 210, 4 Camp. 385; *Donaldson v. Forster*, Abb. on Shipp. part 3, cap. 1; *Baker v. Payne*, 1 Ves. jun. 459; *Raitt v. Mitchell*, 4 Camp. 156; *Lethulier's Case*, 2 Salk. 443; *Charaud v. Angerstein*, Peake, 43; *Bold v. Rayner*, 1 M. & W. 446; *Powell v. Horton*, 2 Bing. N. C. 668; *Bowman v. Horsey*, 2 M. & Rob. 85; [*Elliott v. Wilson*, 7 Brown P. C. 459; *Jones v. Clarke*, 2 H. & N. 725; *Allan v. Sundius*, 1 H. & C. 123; *The Russian Steam Navigation Trading Co. v. Silva*, 13 C. B. N. S. 610.] And, as to evidence of a usage to pay an agent, *Hutch v. Carrington*, 5 C. & P. 471: for a factor to sell in his own name, *Johnston v. Osborne*, 11 A. & E. 549; that "sold 18 pockets Kent hops at 100s." means in the hop trade 100s. per cwt., *Spicer v. Cooper*, 1 Q. B. 424; that "in turn to deliver," in a charter-party to Algiers means at a particular spot in the port for a particular purpose, *Robertson v. Jackson*, 2 C. B. 412; [(as to the term "to load in regular turn," see *Hudson v. Clementson*, 18 C. B. 213; *Lawson v. Burness*, 1 H. & C. 396); that "bale" in the Gambier trade means a compressed package, weighing on the average two cwt., *Gorrisen v. Perrin*, 2 C. B. N. S.

681; that oil is "wet" if it contains any water, however little, *Warde v. Stewart*, 1 C. B. N. S. 88;] to show the meaning of the description "about" so many quarters, in a delivery order, *Moore v. Campbell*, 10 Exch. 323; to explain the sense in which the word "London" was employed, *Mallan v. May*, 13 M. & W. 511; [an article sold in London as "Calcutta linseed," (for which there was a market there,) was held to answer the description, although it contained about 15 per cent. of tares, rape, and mustard, on the ground that the admixture of foreign substances was not so great as to destroy the distinctive character of the article, and prevent its passing in the market under the name given to it in the contract, *Wieler v. Schilizzi*, 17 C. B. 619.]

In *Sutton v. Tatham*, 10 A. & E. 27, it was laid down that a person employing a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, though the principal be himself ignorant of them. And in *Bayliffe v. Butterworth*, 1 Exch. 416, *Sutton v. Tatham* was expressly approved of by Parke, B., and Rolfe, B.; and Alderson, B., laid down the law generally, that "a person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place

must be taken as intending that the contract may be made according to the usage of that place." [Acc. *Taylor v. Stray*, 2 C. B. N. S. 175; *Stray v. Russell*, 1 El. & El. 888; 29 L. J. Q. B. 115; *Smith v. Lindo*, 5 C. B. N. S. 587; *Greaves v. Legge*, 11 Exch. 642, S.C. in error, 2 H. & N. 216; *Lloyd v. Guibert*, 35 L. J. Q. B. per curiam.] And Parke, B., distinguished the cases of *Gabay v. Lloyd*, 3 B. & C. 793, and *Bartlett v. Pentland*, 10 B. & C. 760, in which the usage of Lloyd's Coffee-house was held not to be binding on persons who were not shown to have been cognizant of, or to have assented to it, on the ground that in *Bayliffe v. Butterworth*, the question was as to the authority which the broker received. In *Stewart v. Cauty*, 8 M. & W. 160, a rule of the Liverpool Stock Exchange was admitted in evidence between parties not members of it, upon a question what was a reasonable time for the completion of a sale of shares made at Liverpool through the agency of brokers. See further, *Stewart v. Aberdeen*, 4 M. & W. 211. [*Gabay v. Lloyd* has been confirmed by *Sweeting v. Pearce*, 7 C. B. N. S. 449, affirmed in error, 9 C. B. N. S. 534; 30 L. J. C. P. 109, in which latter case the principle laid down in *Scott v. Irving*, 1 B. & Ad. 606, is adopted, namely, that a usage to substitute another person as debtor to the principal can only bind those who have notice of it.]

So in a case not falling within the head of mercantile contracts, evidence has been received to show that by the custom of a particular district the words "1000 rabbits" meant 1200 rabbits, *Smith v. Wilson*, 3 B. & Ad. 728; and see *Clayton v. Gregson*, 5 A. & E. 302. So in *Reg. v. Stoke-upon-Trent*, 5 Q. B. 303, an agreement in writing "to serve B. from 11 Nov., 1815, to 11 Nov., 1817," at certain wages, "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants," was considered capable of explanation by a usage in the particular trade for servants, under similar contracts, to have certain holidays and Sundays to themselves. See *Phillips v. Innes*, 4 Cl. & Fin. 234. Also in *Grant v. Maddox*, 15 M. & W. 737, an agreement by the manager of a theatre to engage an actress "for three years, at a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years respectively," was explained by the usage of the theatrical profession to mean that the actress was to be paid only whilst the theatre was open for performance. [In *Parker v. Ibbetson*, 4 C. B. N. S. 346, a custom that the yearly hiring of a clerk is determinable by a month's notice at any time, was held not inconsistent with a provision in the agreement, that at the end of the year the employer, if satisfied with the amount of business done, would make an addition of 30*l.* to

the stipulated salary.] So, again, in *Evans v. Pratt*, 3 M. & G. 759; 4 Scott, N. R. 370, S. C., in a memorandum as to a race, the run described was "four miles across a country," and evidence was admitted to show that in sporting parlance the meaning of those words is straight across over all obstructions without liberty to go through open gates. So if A. and B. were to agree for a lease, it would be implied from custom that the lessor should prepare and the lessee pay for it. *Grissell v. Robinson*, 3 Bing. N. C. 11. Although in general, upon a sale of property, the vendee who is to bear the expense of the conveyance ought to prepare it. *Price v. Williams*, 1 M. & W. 6; *Poole v. Hill*, 6 M. & W. 835; *Stephens v. De Medina*, 4 Q. B. 422. See, however, *Doe d. Clarke v. Stilwell*, 8 A. & E. 645. [As to the liability by usage of a man about to marry to pay his wife's solicitor for preparing her marriage settlement, see *Helps v. Clayton*, 17 C. B. N. S. 553; 34 L. J. C. P. 1. In *The North Staffordshire Rail. Co. v. Peek*, E. B. & E. 986, the majority of the court held that the terms in a letter to carriers from their customer, "Please send the marbles *not insured*," were to be read "according to the understanding of language between carriers and their customers," and construed as a request to carry the marbles at the customer's risk. But this decision turned

upon the construction of a statute, and was reversed in the House of Lords, 10 H. of L. Ca. 473; 32 L. J. Q. B. 241.]

But the admissibility of evidence of custom to explain the meaning of a word used in any contract whatever, is subject to this qualification, *viz.*, that if an act of parliament have given a definite meaning to any particular word denoting weight, measure, or number, it must be understood to have been used with that meaning, and no evidence of custom will be admissible to attribute any other to it; *per curiam* in *Smith v. Wilson*; see also *Hockin v. Cooke*, 4 T. R. 314; *The Master of St. Cross v. Lord Howard de Walden*, 6 T. R. 338; *Wing v. Erle*, Cro. Eliz. 267; *Noble v. Durrell*, 3 T. R. 271. In *Doe v. Lea*, 11 East, 312, it was held that a lease *by deed* of lands since the new style, to hold from the feast of *St. Michael*, must mean *New Michaelmas*, and could not be shown by parol evidence to refer to *Old Michaelmas*. In *Furley v. Wood*, 1 Esp. 198, Runn. Eject. 112, Lord Kenyon had, under similar circumstances, admitted parol evidence of the custom of the country to explain the meaning of the word *Michaelmas*; and the court, in *Doe v. Lea*, on hearing that case cited, asked whether the holding there was *by deed*, which it does not appear to have been; and to which it may be added, that it appears pos-

sible that it was not even in writing.

In *Doe v. Benson*, 4 B. & A. 588, evidence of the custom of the country was held admissible for the purpose of showing that a letting *by parol* from *Lady-day*, meant from *Old Lady-day*. The court referred to *Furley v. Wood*, and distinguished that case from *Doe v. Lea*, on the ground that the letting there was *by deed*, "which," said Holroyd, Justice, "is a solemn instrument; and therefore parol evidence was inadmissible to explain the expression *Lady-day* there used, even supposing that it was equivocal." It is perhaps not easy to conceive a distinction, founded on principle, between the admissibility of evidence to explain terms used in a *deed*, and terms used in a written contract not under seal: for though, when the terms of a deed are ascertained and understood, the doctrine of estoppel gives them a more conclusive effect than those of an unsealed instrument; yet the rule that parol evidence shall not be admitted to vary the written terms of a contract, seems to apply as strongly to a contract without a seal as with one; while, on the other hand, it appears from the principal case of *Wigglesworth v. Dallison*, without going further, that in cases where parol evidence is in other respects admissible, the fact that the instrument is under seal forms no insuperable obstacle

to its reception. Nor does it seem necessary, in order to prevent a contradiction between *Doe v. Lea*, and *Doe v. Benson*, and *Furley v. Wood*, to establish any such distinction between deeds and other written instruments; for in *Doe v. Benson*, the letting seems not to have been in writing, so that the objection to the admission of parol evidence, founded upon the nature of a written instrument, did not arise. In *Furley v. Wood* the letting was perhaps also by mere parol; and though the evidence was, it is true, offered to explain the notice to quit, still it may be urged, that when the holding was once settled to commence from *Old Michaelmas*, the notice to quit, which probably contained the words "at the expiration of your term," or something *ejusdem generis*, must be held to have had express reference to, and to be explained by it. We must not therefore, it is submitted, too hastily infer that parol evidence of custom would be receivable to explain a word of time used in a lease in writing, but not under seal.

Doe v. Lea was acted upon by the Court of Common Pleas in *Smith v. Walton*, 8 Bing. 238, where the defendant avowed for rent payable "at *Martinmas to wit*, November 23rd:" the plaintiff pleaded *non tenuit*; and a holding from *Old Martinmas* having been proved, the court thought that the words after the *videlicet* must be

rejected, as inconsistent with the term *Martinmas*, which they thought themselves bound by statute to interpret November 11th; that no evidence was admissible to explain the record; and that there was, therefore, a fatal variance between it and the evidence; see *Hockin v. Cooke*, 4 T. R. 314; *The Master of St. Cross v. Lord Howard de Walden*, 6 T. R. 338; *Kearney v. King*, 2 B. & A. 301; *Sproule v. Legge*, 1 B. & C. 16. [*Hogg v. Berrington*, 2 F. & F. 246; as to weights, see *Hughes v. Humphreys*, 3 E. & B. 954; *Giles v. Jones*, 11 Exch. 393.]

However, evidence of usage, though sometimes admissible to add to, or explain, is never so to vary, or to contradict, either expressly or by implication, the terms of a written instrument. *Magee v. Atkinson*, 2 M. & W. 442; *Adams v. Wordley*, 1 M. & W. 374; *Trueman v. Loder*, 11 A. & E. 589; [see *Humfrey v. Dale*, E. B. & E. 1004.] Thus, in *Yeates v. Pym*, 6 Taunt. 445, in an action on a warranty of *prime singed bacon*, evidence was offered of a usage in the bacon trade, that a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer the description of *prime bacon*. This evidence was held inadmissible, first at *Nisi Prius*, by Heath, Justice, and afterwards by the Court of Common Pleas. In *Blackett v. Royal Exchange*

Insurance Company, 2 Tyrwh. 266, which was an action on a policy upon "*ship, &c., boat, and other furniture*," evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits on the larboard quarter; but was rejected at *Nisi Prius*, and the rejection confirmed by the Court of Exchequer. "The objection," said Lord Lyndhurst, delivering judgment, "to the parol evidence is, not that it was to explain any ambiguous words in the policy, or any words which might admit of doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used, *viz.*, that whereas the policy imported to be upon ship, furniture, and apparel generally, the usage is to say that it is not upon furniture and apparel, generally, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain." [See also *Suse v. Pompe*, 8 C. B. N. S. 538, where evidence was given of a usage in London that on non-payment by the acceptor of a bill of exchange drawn and indorsed in England, and payable abroad at a certain rate of exchange, the holder is entitled at his election to recover from the drawer either the re-exchange or the amount which he paid for the bill. This evidence was held inad-

missible, as contradicting the terms of the bill.] In *Roberts v. Barker*, 1 C. & M. 808, the question was whether a covenant in a lease, whereby the tenant bound himself not, on quitting the land, to sell or take away the manure, but to leave it to be expended by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it. The court held that it did. "It was contended," said Lord Lyndhurst, delivering judgment, "that the stipulation to leave the manure was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be engrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." *Accord. Clarke v. Roy-stone*, 13 M. & W. 752. See further, *Reading v. Menham*, 1 M. & Rob. 236; [*Clarke v. Westrope*, 18 C. B. 765]; *Foster v. Mentor Life Assurance*, 4 E. & B. 48. *Hall v. Janson*, 4 E. & B. 500, was an action upon a policy of marine insurance in the ordinary form, in

which the interest was declared to be "on money advanced on account of freight," and the count alleged the interest to be in the shipowner, and that it became subject to a general average contribution: a plea to that count stating a custom of London, where the policy was made, that insurance upon "money advanced on account of freight" should not be liable for a general average, was held bad, the custom alleged being inconsistent with the terms of the policy.

[Terms not incidental to those expressed in the written contract cannot be annexed to it by oral evidence of a particular usage of trade. Thus a charterer of a vessel for a voyage from here to China, the ship to be consigned to his agents there, free of commission, sought in vain upon the strength of a particular custom to add to the charter a term that the agents in China should be entitled to procure charters for the return voyage from China and be paid commission on the amount of freight mentioned in such charters, *Philips v. Baird*, 1 H. & N. 214. Parol evidence is inadmissible to show that the parties to a written contract intended to exclude the incorporation into it of a customary incident, *Fawkes v. Lamb*, 31 L. J. Q. B. 98.

A case occurred a few years ago (*Humfrey v. Dale*, 7 E. & B. 266, in error, E. B. & E. 1004), in which it should seem that not

merely a term but a *party*, was on oral evidence of a custom added to a contract in writing. The action was against Dale, Morgan, & Co., brokers, for not accepting ten tons of oil alleged in the declaration to have been sold to them by the plaintiff, and it was held to be maintainable, first by the Q. B. and afterwards in C. S., Martin, B., Willes, J., and Channell, B., dissenting. These were the facts: The plaintiff had employed T. & M., brokers, to sell the oil for him, and one Schenk employed the defendants to buy it. The brokers met, and the sale was effected, but the only written documents which could be produced as evidence of it were, first, a sale note of the oil signed by the defendants, which commenced thus, "Sold this day *for Messrs. T. & M. to our principals,*" and ended with the signature, "Dale, Morgan, & Co., brokers," and "a quarter per cent. brokerage to D., M. & Co.;" secondly, a sale note signed by T. & M., "brokers," and which commenced thus: "Sold to *Dale, Morgan, & Co., for account of Mr. Humphrey*" (the plaintiff), and ended with the clause, "quarter per cent. brokerage to D., M., & Co., half to us." The first of these notes was sent by the defendants to T. & M., the second by T. & M. to the plaintiff. There was evidence of usage of the particular trade that whenever a broker buys or sells without disclosing his principal, he is himself personally liable to be looked to as buyer or seller, and that it was in accordance with the usual practice in such cases that T. & M. had not sent the defendants a note of the contract. The defendants did not disclose their principal until after tender of the oil and after he had become insolvent. The Court of Q. B. held the evidence of usage to be admissible. They considered that by necessary implication the defendants had in the first note said that they had *bought* for their principals, and though they said they sold for T. & M. they had shown, as they might, that T. & M. were only agents for the plaintiff. The court then proceeded to say that "the plaintiff did not seek, by the evidence of usage, to contradict what the tenor of the note primarily imported, namely, that this was a contract which the defendants made as brokers. The evidence indeed is based on this: the usage can have no operation except on the assumption of their having so acted, and of there having been a contract made with their principal. But the plaintiff, by the evidence, seeks to show that according to the usage of the trade, and as those concerned in the trade understand the words used, they import something more; namely, that if the buying broker did not disclose the name of his principal it might become a contract with him if the seller pleased. Supposing this incident had been expressed

on the face of the note, there would have been no objection to it, as affecting the validity of the contract; for the effect of it would only have been that the sale might be treated by the vendor as a sale to the broker, unless he disclosed the name of his principal; if he did that, it remained a sale to the principal, assuming, of course, the broker's authority to bind him." The court admitted that in *one* sense the evidence varied the contract. "In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations and be different contracts. The truth is, that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but *those only which were necessary to be determined in the particular case* by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and varying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly include them. It is, perhaps, to be regretted that

this judgment was not taken up to the House of Lords. The latter part of it was cited by the court in *Myers v. Sarl*, 30 L. J. Q. B. 9. In that case the question was whether a builder could recover for *extra* work done by him, it being provided by the contract under which he did the principal work, that "no alterations or additions should be admitted unless directed by the defendant's architect in writing, and a *weekly account* of the work done thereunder should be delivered to the architect," the delivery of which account was to be a condition precedent to recovery of payment for such work, and only weekly accounts of day-work and materials (forming a large part of the amount claimed) had been delivered, but by custom in the building trade the term "weekly accounts" meant only accounts of day-work. Judgment was given in favour of the plaintiff.

"The decision of this case," said Blackburn, J., "turns simply upon the point—that the words of a written contract are to be understood in that sense which the phrase has acquired in the trade with regard to which it is used. It is the *prima facie* presumption that it was the intention of the parties to use it in that sense, and having expressed themselves in a written contract making use of the phrase, it is *prima facie*, as a matter of construction of the contract, to be taken that they used

the phrase in the peculiar and limited sense which it had acquired in the trade. That peculiar and limited sense, if such an one had been acquired, must be shown by parol evidence: and this having been shown, then the presumption is that that was the sense in which the parties making the contract used it. I do not think that in order to introduce this extrinsic evidence, it is necessary that the phrase itself should be at all on the face of it ambiguous." Then referring to the rule laid down in this work, *ante*, p. 548, the learned judge says, "That I take it is the true rule of law upon the matter that in each case of a contract where it is shown that the term or phrase has acquired a peculiar meaning in the trade, it is *prima facie* to be taken as used with that meaning, unless upon construing the whole contract you can see, either in express terms or by necessary implication, the parties intended to use it in a different sense;" see also the report of this case 3 El. & El. 306.

In both of the last-cited cases, *Blackett v. The Royal Exchange Insurance Co.* was mentioned with disapproval. See also *Miller v. Titherington*, 6 H. & N. 278; 30 L. J. Exch. 217, in which a custom in the timber trade between British North America and England, that underwriters under the ordinary form of policy are not liable to pay general average on account of the

jettison of any timber stowed on deck, was held to be a defence to an action for such general average.]

As to the admissibility and effect of previous usage between the parties to a contract, see *Bourne v. Gatcliffe*, 11 Cl. & Fin. 45; *Ford v. Yates*, 2 M. & G. 549; 2 Scott, N. R. 645, S. C.; [*Cumming v. Shand*, 5 H. & N. 95; 29 L. J. Exch. 129].

Lord Eldon, in *Anderson v. Pitcher*, 2 B. & P. 168, expressed an opinion, that the practice of admitting usage to explain contracts ought not to be extended, [but the tendency of the courts appears now to be the other way.] See also the expression of the court in *Trueman v. Loder*, 11 A. & E. 589; and *Johnstone v. Usborne*, *Ibid.* 549. [But see *Humfrey v. Dale*, 7 E. & B. 266; E. B. & E. 1004.] In *Cross v. Eglin*, 2 B. & Ad. 106, evidence had been offered for the purpose of showing that the plaintiffs, who had contracted for "300 quarters (*more or less*) of foreign rye," could not, consistently with the usage of trade, be required to receive so large an excess as 45 quarters over the 300: the question as to the admissibility of the evidence ultimately proved immaterial; but Littledale, J., said that where words were of such *general import*, he should feel much difficulty in saying that evidence ought to be received to ascertain their meaning. See *Lewis v. Marshall*, 8 Scott, N. R.

477; 7 M. & G. 729, S. C. *per curiam*. *Moore v. Campbell*, 10 Exch. 323; *Bourne v. Seymour*, 16 C. B. 337. [*Carter v. Crick*, 4 H. & N. 412.]

When evidence of usage is admitted, evidence may be given in reply, tending to show such usage to be unreasonable. *Bottomley v. Forbes*, 5 Bing. N. C. 128.

It is right to observe, that though in certain cases above pointed out evidence of usage is received to explain the terms used in a contract, yet when the jury have decided on the meaning of those terms, it is not for them but for the court to put a construction upon the entire contract or document. *Hutchinson v. Bowker*, 5 M. & W. 535, and the judgment in *Neilson v. Harford*, 8 M. & W. 806. [As to what is sufficient evidence to establish a usage of trade by which particular words in an instrument have acquired a peculiar meaning, see *Mackenzie v. Dunlop*, 3 Macq. H. of L. C. 22. *Kidston v. Empire Marine Company*, 35 L. J. C. P. 250.

It was said in a recent case before the judicial committee, *Kirchner v. Venus*, 12 Moore, P. C. 361, that when evidence of the usage of a particular place is admitted to add to or in any manner to affect the construction of a written contract, it is *only* on the ground that the parties *who made the contract* are both cognisant of the usage, and

must be presumed to have made their agreement with reference to it, and that no such presumption can arise when one of the parties is ignorant of it. And that is adopted in the marginal note as the statement of a general rule of law. It should seem, however, (see ante, 551) that the proposition must be restrained to subject matters like that before the court, namely, the condition of the holder for value of a negotiable instrument showing upon the face of it a clear right of the ordinary and usual kind unaffected by the custom; and the subsequent part of the judgment dwelt upon the special circumstances as being important. In *Kirchner v. Venus*, the indorsees resident in Sydney, of bills of lading, made in Liverpool, for the carriage of goods from Liverpool by the ship "Countess of Elgin," to Sydney, were, in an action of trover by them against the master of the ship for having refused to deliver up the goods at Sydney unless paid freight, held not to be bound by an alleged custom in Liverpool, of which the plaintiffs were ignorant, that though by the terms of the bills the freight was payable in Liverpool at a certain time after sailing, still the ship-owner, if it was not paid, had a lien for it at the port of discharge. An universal usage cannot be set up against the general law. *Meyer v. Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289.]

MOSS v. GALLIMORE AND ANOTHER.

MICHAELMAS.—20 GEO. 3.

[REPORTED DOUGL. 279.]

A mortgagee, after giving notice of the mortgage to a tenant in possession, under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice.

In a notice for the sale of a distress, it need not be mentioned when the rent fell due.†

IN an action of trespass, which was tried before *Nares*, Justice, at the last assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved. The case stated as follows: One *Harrison* being seised in fee, on the 1st of January, 1772, demised certain premises to the plaintiff for twenty years, at the rent of 40*l.*, payable yearly on the 12th of May; and in May, 1772, he mortgaged the same premises, in fee, to the defendant *Mrs. Gallimore*. *Moss* continued in possession from the date of the lease, and paid his rent regularly to the mortgagor all but 28*l.*, which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being at the time indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3rd of January, 1779, one *Harwar* went to the plaintiff, on behalf of *Gallimore*, showed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that *Gallimore* made of the rent. The plaintiff

† A man is not bound by his notice of distress, *Crouther v. Rambottom*, 7 R. R. 654, per Lord Kenyon, [*Philips v. Whitsed*, Q. B. 1st May, 1860, 29 L. J. 164.] A notice of distress must be in writing, *Wilson v. Nightingale*, 8 Q. B. 1034.

told Harwar that the assignees of Harrison had demanded it before, *viz.*, on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said, he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered, and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c., by virtue of an authority, &c., for the sum of 28*l.*, being rent, and arrears of rent, due to the said Esther Gallimore, at Michaelmas last past, for, &c., and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of 22*l.* 2*s.* The question stated for the opinion of the court was, whether, under all the circumstances, the distress could be justified?

Wood for the plaintiff. *Bower* for the defendants.

Wood.—The plaintiff's case rests upon two grounds: 1st, The defendant, Gallimore, not being, at the time when the rent distrained for became due, in the actual seisin of the premises, nor in the receipt of the rents and profits, she had no right to distrain. 2nd. The notice was irregular, being for rent due at Michaelmas, whereas this rent was only due and payable in May.—1. Before the statute of 4 Anne, c. 16 (*a*), a conveyance by the reversioner was void without the attornment of the tenant (*b*), which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence, that a grantee has now a right to distrain, before he turns his title into actual possession. The mortgagor (according to a late case (*c*)), is tenant at will to the mortgagee, and has a right to the rents and profits due before his will is determined. Nothing in this case can amount to a determination of the will, before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made became due

(*a*) Sect. 9.

(*b*) Co. Litt.
300, a. b.

(*c*) *Keech v.*
Hall, M. 19
Geo. 3, *ante*,
p. 523.

before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force; the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for the rent, as well as Gallimore, and how could he take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. It does not appear, from the case, that the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest. 2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the statute of William and Mary (a); but it is thereby required that notice shall be given thereof, "with the cause of taking," &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal. It is true, this irregularity, since the statute of 11 Geo. 2 (b), does not make the defendants trespassers *ab initio*, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity.†

(a) 2 W. & M.
Sess. 1, c. 5,
s. 2.

(b) Cap. 19,
s. 19.

† See on this
point ante,
p. 137.

Lord *Mansfield* observed, that the defendant was precluded by the case from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only, whether the distress was justifiable: and *Buller*, Justice, said that it was not necessary, by the statute of William and Mary, to set forth, in the notice, at what time the rent became due.

Bower.—If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and Harwar would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title; like a feoff-

(a) 1 Anders.
256. *Vide*
S. C. Cro. El.
209.

(b) 4 Anne,
cap. 16, s. 9.

(c) Sec. 10.

(d) *White v.*
Hawkins,
M. 19 Geo. 3.
This practice
was anomalous,
and no longer
exists. See note
to *Keech v.*
Hall, ante,
p. 523.

ment and livery, or a fine or recovery and the deed declaring the uses; *Long v. Hemming* (a). Now, however, any doubts there might have been on this subject are entirely removed by the statute of Queen Anne, the words of which are very explicit, viz. (b): "that all grants or conveyances of any manors, rents, reversions, or remainders, shall be as good and effectual to all intents and purposes, without any attornment of the tenants, as if their attornment had been had and made." The proviso in the same statute (c), which says, that the tenant shall not be prejudiced by the payment of any rent to the grantor before he shall have received notice of the grant, shows, that it was meant that all the rent which had not been paid at the time of the notice should be payable to the grantee. The mortgagor is called a tenant at will to the mortgagee. That may be true in some respects, but it is more correct to consider him as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to, at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents, by an ejectment against a tenant under a lease prior to the mortgage (d). The interest, it is said, is not stated to have been demanded: but the case states, that, at the time of the notice and distress, more than the amount of the rent in arrear was due. It is said, the tenant could not decide between the mortgagor (or, which is the same thing, his assignees) and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, at law, a complete sale, and only differing from it in respect of the equity of redemption, which is a mere equitable interest.

The court told him it was unnecessary for him to say anything on the other point.

Lord Mansfield.—I think this case, in its consequences, very material. It is the case of lands let for years and

afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee when the tenant colludes with the mortgagor; for, the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. *Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not the mortgagor.*† This, however, is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment; *but there is a provision, that the tenant shall not be prejudiced for any act done by him as holding under the grantor, till he has had notice of the deed. Therefore, the payment of rent before such notice is good.* With this protection, he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of executions, it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him

† But this is at present never permitted. See *ante*, note to *Keech v. Hall*.

rent. He is only *quodam modo*. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant in the present case cannot be damnified, for the mortgagor can never oblige him to pay over again the rent which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

Ashurst, Justice.—The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered if there is an under-tenant; for there can be no such thing as an under-tenant to a tenant at will. *The demise itself would amount to a determination of the will.* There being in this case a tenant in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

Butler, Justice.—There is in this case a plea of the general issue, which is given by statute (a), but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded; but since that statute it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech v. Hall*, referred to by Mr. Wood, the court did not consider the mortgagor as tenant at will to all purposes. If my memory do not fail me, my Lord distinguished mortgagors from tenants at will in

(a) 11 Geo. 2,
c. 19, s. 21.

a very material circumstance, namely, that a mortgagor would not be entitled to emblements. *Expressions used in particular cases are to be understood with relation to the subject-matter then before the court.*

The postea to be delivered to the defendants.

Moss v. Gallimore is the leading case upon a point which seems so clear in principle that, were it not for its very general importance, it would be perhaps a matter of some surprise that any case should have been requisite to establish it. The mortgagor having conveyed his estate to the mortgagee, the tenants of the former become of course the tenants of the latter, the necessity of their attornment being done away with by the statute of Anne, which, though it provides that they shall not be prejudiced by the abolition of attornment, and consequently renders valid any payments they may have made to the mortgagor, without notice of the mortgage, nevertheless places the mortgagee in the situation of the mortgagor, immediately upon the execution of the mortgage-deed, subject only to that proviso in favour of the tenants; and enables him, by giving notice to them of the conveyance, to place himself to every intent in the same situation towards them as the mortgagor previously occupied, *Rawson v. Eicke*, 7 A. & E. 451; *Burrowes v. Gradin*, 1 Dowl. & L. 213. Such being the situation of the tenant

with respect to the mortgagee, it would of course be unfair that he should not be proportionably exonerated from his liabilities to the mortgagor; therefore, where a lessor, after the execution of the lease, mortgaged the premises, it was held that he could not afterwards maintain ejectment for a forfeiture, *Doe dem. Marriott v. Edwards*, 5 B. & Ad. 1065.

Such being the situation of a tenant who comes in under the mortgagor *before* the mortgage; let us now examine a subject which seems to involve more difficulty, namely, that of a tenant who has entered under the mortgagor *subsequently* to the mortgage; for it was once alleged, that though a tenant who had entered previous to the mortgage became the tenant of the mortgagee after the mortgage, and might, if any proceedings were afterwards instituted against him by the mortgagor, show that, although that person was once his landlord, he had now conveyed away his estate in the premises; (according to the ordinary rule of law, that a tenant, though he cannot dispute the title of the landlord under whom he entered, may confess and avoid it

by showing that it has now determined; see *Doe dem. Marriott v. Edwards* above cited;) still that a tenant who had entered since the mortgage was differently situated, for that he was estopped from disputing the title of the mortgagor, and could not confess and avoid it, inasmuch as it had never really existed during the period of his possession; and this idea derived a good deal of countenance from the decision of the Court of Common Pleas, in *Alchorne v. Gomme*, 2 Bing. 54. However, the subject was afterwards fully discussed in *Pope v. Biggs*, 9 B. & C. 245. In that case Garbet, being the owner of six houses, mortgaged them to various persons; and after the mortgage, let to several persons. Biggs, the defendant, was tenant of one of the houses, and received the rents of the others as agent for Garbet, who became bankrupt; and thereupon the mortgagees gave notice to the tenants of the houses that the interest was in arrear, and required them to pay the amount of the interest, in part of rent, and similar sums out of future rents, until further notice. At this time there was rent in arrear, and other rents subsequently became due: these were received by the defendant, and applied by him to the interest due on the mortgage, with the exception of a sum which would not be sufficient to meet the next half-year's interest. To recover these moneys, an action was brought against the defendant Biggs by the assignees of Garbet; but the court held that they were not entitled to recover. "I have no doubt," said Bayley, J., "that, in point of law, a tenant who comes into possession under a demise, from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents, and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. *But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents.*" "The mortgagor," said Parke, J., "may be considered as acting in the nature of a bailiff or agent for the mortgagee. His receipt of rent will, therefore, be good until the mortgagee interferes, and he may recover on the contracts he has himself entered into in his own name with the tenants. But where the mortgagee determines the implied authority by a notice to the tenants to pay their rents to him, the mortgagor can no longer receive or recover any unpaid rent, whether already due or no." And in *Waddilove v. Barnett*, 4 Dowl. 348, the law on this point was considered so completely settled, that, as remarked by Tindal, C. J., it was not even attempted to argue that the tenant

was estopped from showing that the mortgagor's right had been determined by a notice.

The view taken by Parke, J., in *Pope v. Biggs*, in which the mortgagor is treated as the mortgagee's agent, if he think fit to adopt him as such, seemed to be in accordance with a decision of the Court of Common Pleas in a case not arising, it is true, between mortgagor and mortgagee, but between trustee and *cestui que trust*. *Vallance v. Savage*, 7 Bing. 595, was an action on the case by John Vallance for an injury to his reversion by obstructing a highway leading to a dwelling-house which the declaration alleged to be in the occupation of Sarah Pell, *as tenant to the plaintiff*. The evidence was that John Vallance, the plaintiff, was a trustee; that one James Vallance was his *cestui que trust*, and had let the premises in question to Sarah Pell, from whom he received the rent. It was objected that Sarah Pell was not tenant to the plaintiff, but to James Vallance; and, consequently, that the plaintiff had not the reversionary interest set forth in the declaration. But the court held that the plaintiff had a right to adopt, and had adopted, Sarah Pell as his tenant. "In the present case," said Tindal, C. J., "inasmuch as the plaintiff has brought an action, and has alleged that Pell was a tenant to him, that is a sufficient adoption of her as tenant, and there is no failure in

the proof of the allegation on record. *Even in the case of mortgagor and mortgagee whose interests are adverse, acts of the mortgagor assented to by the mortgagee are considered as acts of the mortgagee.* By the stronger reason, then, the act of the *cestui que trust*, whose interest is under the trustee, must, if known, and not repudiated, be considered the act of the trustee." See *Meggison v. Harper*, 4 Tyrwh. 100; *Burrowes v. Gradin*, 1 Dowl. & L. 213, Wightman, J. The doctrine thus promulgated in *Pope v. Biggs* was, however, shaken by *Partington v. Woodcock*, 5 N. & M. 672, and 6 A. & E. 690, where Patterson, J., adverting to the expressions of Bayley, J., above cited, says, "I never could understand how the notice of the mortgagee could make the lessee tenant to him at the reserved rent." Very strong expressions to the same effect were also used in *Rogers v. Humphreys*, 4 A. & E. 313. And at length, in *Evans v. Elliot*, 9 A. & E. 342, it was expressly decided by the Court of Queen's Bench, [on a question whether the mortgagee had a right to distrain,] *that the mortgagee cannot by the mere fact of giving the mortgagor's tenant a notice cause him to hold of himself the mortgagee, and that even a subsequent attornment by the tenant to the mortgagee will not have the effect of setting up his title as landlord by relation.* The result of this decision and of

that of the Court of C. P. in *Brown v. Storey*, 1 Scott, N. C. 91; 1 M. & G. 117; seems to be that, in order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascertained (as in an ordinary case) from the same evidence which proves its existence, but that it does not lie in the power of the mortgagee by a mere notice to cause the tenant in possession to hold under him *on the same terms* on which he held under the mortgagor—or indeed upon any terms at all without his own consent. And that where the tenant does consent to hold under the mortgagee, *a new tenancy* is created, not a continuation of the old one between him and the mortgagor. [See the judgment in *Waddilove v. Barnett*, 2 Bing. N. C. 538.] In *Brown v. Storey*, indeed, the Court of Common Pleas expressed an opinion that, if the mortgagor's tenant, after receiving notice from the mortgagee to pay rent to him, continued in possession, it might fairly be inferred that he assented to continue as tenant to the mortgagee *upon the old terms*.

It should seem that the cases on this subject might be reconciled to ordinary principles, without straining after any peculiar rule applic-

able to the case of mortgagor and mortgagee, by observing that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may in case of an eviction by the mortgagee, either actual or constructive, (for instance, an attornment to him under threat of eviction, see *Doe d. Higginbotham v. Barton*, 11 A. & E. 314; *Mayor of Poole v. Whitt*, 15 M. & W. 571; [and the judgments in *Delaney v. Fox*, 2 C. B. N. S. 768, and *Carpenter v. Parker*, 3 C. B. N. S. 237; S. C. 27 L. J. C. P. 78],) dispute the mortgagor's title to either the land or the rent, (which is no more than any tenant may do upon an eviction by title paramount;) and further, that he may, although there have been no eviction, defend an action for rent by proof of a payment under constraint, in discharge of the mortgagee's claim, *Johnson v. Jones*, 9 A. & E. 809, (which right is analogous to that of an ordinary tenant in respect of payments on account of rent-charges, and other claims issuing out of the land, of which examples are cited in the note to *Lampleigh v. Braithwaite*, ante, 156;) so that a tenant who has come in under the mortgagor after the mortgage, and has neither paid the rent to the mortgagee, nor been evicted by him either actually or constructively before the day of payment, cannot defend an action by the mortgagor for that rent, *Wheeler v. Branscombe*,

5 Q. B. 373; [and see *Cuthbertson v. Irving*, 4 H. & N. 742, affirmed in error, 6 H. & N. 135.]

In *Burrows v. Gradin*, 1 Dowl. & L. 213, (which may be considered a middle case,) Wightman, J., held, that an agreement [made after the mortgage] between the mortgagor, and a tenant from year to year whose tenancy commenced before the mortgage, for payment of an additional annual sum as rent, in consideration of improvements made by the mortgagor, had not the effect of so changing the situation of the parties, that the tenant could be considered as no longer holding of the mortgagee; and further, that the mortgagee might adopt the dealing of the mortgagor as his agent, and (after notice of the mortgage) recover not merely the amount of rent originally payable, but the additional sum also, which, in consequence of the improvement of the land, the tenant agreed to pay; a remarkable decision, so far as relates to the additional sum agreed to be paid, because it appears from *Donellan v. Read*, 3 B. & Ad. 899, and *Lambert v. Norris*, 2 M. & W. 334, that that sum was not rent properly so called, but a sum in gross, for which an assignee of the reversion could not sue, nor could an assignee of the term be sued. The reasoning of Wightman, J., though expressly limited to the peculiar circumstances of the case, and especially founded on that of the

tenancy having existed at the time of the mortgage, tends in some degree to confirm the conclusions drawn from *Pope v. Biggs*.

As the mortgagor ceases to be entitled to the rents upon the mortgagee's giving the tenant notice, [and the tenant's paying them to him,] it follows that the mortgagor cannot afterwards maintain any action for use and occupation against him, either for rent which accrued due after the notice, or for rent which accrued due before the notice but was unpaid at the time when the notice was given. But there is a difference between the modes in which the tenant must plead in the former and in the latter case. In the former case he should plead *non assumpsit*, and will be allowed to give the mortgage and notice in evidence, for "when the mortgagee gave notice that the future rent was to be paid to him, it follows that the defendant ceased to occupy by the permission of the mortgagor, but by the permission of the mortgagee;" and, of course, such a defence amounts to a denial of the contract alleged in the declaration which avers the defendant to have used and occupied the land by the permission of the plaintiff, the mortgagor. But in the latter case, *viz.*, where the rent became due *before* notice, but was unpaid at the time of notice, the tenant must plead his defence specially, for "the mortgagor had a right of action against

the defendant up to the time when the notice was given, and before the mortgagee required the rent to be paid to him;" so that the tenant, by setting up this defence, confesses that the right of action, stated in the declaration, once existed, but avoids it by matter *ex post facto*, viz., by the subsequent notice from the mortgagee, *Waddilove v. Barnett*, 4 Dowl. P. C. 347; 2 Bing. N. C. 538.

[With regard, however, to the validity of this defence, doubts were expressed by the court in *Waddilove v. Barnett*. "The mortgagor," said Tindal, C. J., "had a right of action against the defendant up to the time when the notice was given; and it seems to us to be difficult to maintain that because the mortgagee afterwards 'interferes and requires the rents already due from the occupier to be paid to him, the character and consequences of this by-gone occupancy can thereby be altered, or that this right of action which has already vested in the plaintiff' (the mortgagor) 'can thereby be taken away.'" 2 N. C. 543. From recent decisions it appears to be now settled that the mere notice without payment or eviction is not a defence to an action by the mortgagor against the tenant, either for rent due before, (*Wilton v. Dunn*, 17 Q. B. 294; *Hichman v. Machin*, 4 H. & N. 716,) or after the notice (*Hichman v. Machin*).]

In a modern case, *Trent v. Hunt*, 9 Exch. 14, it is said to have been

decided by the Court of Exchequer, that if a lessor having mortgaged his reversion is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission, is *presumptione juris* authorised, if it should become necessary, to realise the rent by distress, and to distrain for it in the mortgagee's name as his bailiff. This is believed to be the first case in which such doctrine has prevailed, and questions may arise as to the liability of the mortgagee in respect of such a distress, the discussion of which will try its soundness. [However, in the later case of *Delany v. Fox*, 2 C. B. N. S. 774, it was said that "the mortgagor has an implied authority from the mortgagee to distrain, until the latter interferes by giving notice," and later still, in *Snell v. Finch*, 13 C. B. N. S. 651, *Trent v. Hunt* was acted upon, the Court suggesting that the implied authority may be limited to a distress on a lawful occasion. See also the judgments in *The Dean, &c., of Christchurch v. The Duke of Buckingham*, 17 C. B. N. S. 391; 33 L. J. C. P. 322.]

I will conclude this note by taking notice of a case which sometimes occurs; viz., that of a lease purporting to be by mortgagor and mortgagee jointly: such an instrument operates as a lease by the mortgagee, with a confirmation by the mortgagor, until

the estate of the former has been determined by paying off the mortgage-money, and then it becomes the lease of the mortgagor, and the confirmation of the mortgagee; and it follow[ed] that, if [before the Common Law Procedure Act, 1852,] ejectment was brought against the tenant during the mortgagee's estate, the demise must have been laid in the name of the mortgagee; if afterwards, in that of the mortgagor; but a joint demise laid in the declaration would not have been improper, *Doe dem. Barney v. Adams*, 2 Tyrwh. 289. See *Doe dem. Barker v. Goldsmith*, Ibid. 710. When a mortgagor and mortgagee join in a lease, and the covenants to pay rent and repair are with the mortgagor and his assigns only, the [assignee of the] mortgagee cannot sue on those covenants, because collateral to his interest in the land, *Webb v. Russell*, 3 T. R. 393; though the mortgagor might sue on them as covenants in gross, *Stokes v. Russell*, 3 T. R. 678; 1 H. Bl. 562. Where the mortgagor and mortgagee join in a lease, containing an express covenant by the mortgagor for quiet enjoyment, no covenant from both can be implied, *Smith v. Pilkington*, 1 Tyrwh. 313. In *Harold v. Whitaker*, 11 Q. B. 147, 163, in a lease by the mortgagor and mortgagee, which recited the mortgage, the reddendum was to the mortgagee, his executors, &c., during the continuance of the mortgage, and after payment and satisfaction thereof, to the mortgagor or his executors, &c., and the lessee covenanted to and with the mortgagee, and also to and with the mortgagor to pay the rent "on the several days and times, and in manner as the same was reserved and made payable. The covenant was holden to be several. [A right of entry reserved to the mortgagor only will not be available to the plaintiffs in ejectment by the mortgagor and mortgagee, *Saunders v. Merryweather*, 3 H. & C. 902; 34 L.J. Exch. 115.]

tractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactment (*subintell.* Statutes of Limitation), or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made or signed by any other or others of them; provided always that nothing herein contained shall alter or take away or lessen the effect of any *payment of any principal or interest* made by any person whatsoever; provided also that in actions to be commenced against two or more such joint contractors or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors, or administrators, shall, nevertheless, be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiffs. And by sect. 2 it is further enacted, that, if any defendant or defendants in any action on a simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued and issue be joined

on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

Since this enactment, one joint contractor [could not] prevent the other from taking advantage of the Statute of Limitations by any species of acknowledgment excepting a part-payment of principal or interest. But as the statute expressly [saved] the effect of such a payment, the principal case of *Whitcomb v. Whiting* [remained still law until recently, when the legislature thought fit to remove this distinction in favour of payment. Accordingly *Whitcomb v. Whiting* was reversed by the 14th section of "The Mercantile Law Amendment Act, 1856" (the 19 & 20 Vict. c. 98), which enacts, in reference to 21 Jac. 1, c. 16, s. 3; 3 & 4 Will. 4, c. 42, s. 3; and the Irish Act, 16 & 17 Vict. c. 113, s. 24, that "when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors, or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason

only [*Cockrill v. Sparkes*, 1 H. & C. 699] of *payment of any principal, interest, or other money*, by any other or others of such co-contractors or co-debtors, executors, or administrators." This enactment has rendered comparatively useless, and therefore caused the omission here of a considerable portion of the notes hitherto appended to this case. The remainder of the notes, as it relates chiefly to Lord Tenterden's Act, and to the question, what proof of payment suffices to save the Statute of Limitations, has not lost its utility.] Where one of two joint drawers of a bill of exchange became bankrupt, and the holder of the bill proved, not upon the bill, but for goods sold, exhibiting the bill as a security, it was held that receipt of dividends on that proof would not take the case out of the statute of limitations, as against the other drawer, *Brandram v. Wharton*, 1 B. & A. 463. In that case the dividend was paid upon the debt proved, and its payment could not, without straining the facts, be treated as a payment on account of the bill; but in general, *where there are several securities for a debt, a general payment on account revives them all*; thus where a promissory note was made by a surety as security for part of the amount of a mortgage, payment of interest on the mortgage was held enough to take the note out of the operation of the statute. *Dowling*

v. Ford, 11 M. & W. 329. [See also *Ex parte Topping*, 34 L. J. Bankr. 44.]

A payment by the assignee of an insolvent joint maker [was held to be insufficient, even before the Mercantile Law Amendment Act, 1856, to take the case out of the statute either as against the insolvent or the other makers], *Davies v. Edwards*, 7 Exch. 22. Where parish officers borrowed money, and gave a promissory note to secure it, signed A. B. &c., churchwardens, C. D. &c., overseers, "or others for the time being," it was held that this form of signature was evidence of an authority to the succeeding officers to pay on account, so as to keep the note alive. *Jones v. Hughes*, 5 Exch. 104; [see 22 & 23 Vict. c. 49, ss. 1 and 4.] In *Neve v. Hollands and wife* [17 Q. B. 262], 21 L. J. 289, payment by a wife, without authority of her husband, on account of a note made by them jointly before marriage, was held insufficient to keep it alive as against him and her.

With respect to the mode of proving a payment [to take the case out of the Statute of Limitations]—it has been held that if goods be given and accepted in part payment within six years, that [saves] the case [from] the statute, *Hooper v. Stephens*, 4 A. & E. 71; *Hart v. Nash*, 2 C. M. & R. 337. But an open account between two tradesmen, each charging the other with goods,

though containing items within six years, has not, without an appropriation of the charges on one side in liquidation of those on the other, the effect of avoiding the bar; for the exception in 9 G. 4 is in favour of payments only, *Cottam v. Partridge*, 4 M. & Gr. 271; 4 Scott, N. R. 819, S. C.; *Clarke v. Alexander*, 8 Scott, N. R. 147; *Foster v. Dawber*, 6 Exch. 839. Where, however, there is such an appropriation by going through the account and striking a balance, with an agreement express or implied that the balance only shall be paid, such a transaction is equivalent to a payment of the lesser debt and a repayment of the amount in liquidation of so much of the greater debt; and so it operates to save the balance of the larger debt from the effect of the statute, *Ashby v. Jumes*, 11 M. & W. 542, *per* Alderson, B.; *Scholey v. Watton*, 12 M. & W. 510, *per* Parke, B., [*Roberts v. Shaw*, 4 B. & S. 44; 32 L. J. Q. B. 308.] A payment on account of the creditor in part liquidation of the debt has of course the same effect as a payment to himself, *Hart v. Stephens*, 6 Q. B. 937; *Worthington v. Grimsditch*, 7 Q. B. 479; see *Clarke v. Hooper*, 10 Bing. 480. In *Bodger v. Arch*, 10 Exch. 333, the maintenance of a child agreed to be taken in satisfaction of interest, was held to be a payment and to take the case out of the statute. In the same case it

was held that payment to any person acting as representative of an intestate accrued for the benefit of the administrator when appointed. [In *Amos v. Smith*, 1 H. & C. 238, the trustees under a marriage settlement lent the husband at interest, on the security of his and A.'s bond conditioned for payment of interest, some of the trust money settled to the separate use of the wife. No interest was paid, but the wife gave the trustees receipts for it under an arrangement that it should be considered as paid, and it was held that the transaction amounted to a payment or satisfaction so as to take the case out of the statute.]

Stat. 9 G. 4, cap. 14, also enacts, [s. 3.] "that no indorsement or memorandum of any payment made upon any bill of exchange, promissory note, or other writing, (that is, other writing constituting the contract according to the dictum of Cresswell, J., in *Bradley v. James*, 13 C. B. 822, where it was held that the statute does not exclude such a memorandum altogether, but only makes it insufficient of itself,) by, or in behalf of, the person to whom such payment is made, shall be deemed sufficient proof of payment to take the case out of the operation of the Statutes of Limitation;" and, that part-payment may have that effect, it must be observed, that there are two requisites besides proof of the naked fact of pay-

ment.—1st, it must appear that the payment was made on account of a larger debt;—2ndly, that that debt is the one sued for; *Tippetts v. Heane*, 4 Tyrwh. 775. See the judgment of Parke, B., there, and see *Holme v. Green*, 1 Stark. 488. In *Evans v. Davis*, 4 A. & E. 840, *Worthington v. Grimsditch*, *supra*, *Burn v. Boulton*, 2 C. B. 476, [and *Collinson v. Margesson*, 27 L. J. Exch. 305,] the evidence was held sufficient for that purpose. In *Waugh v. Cope*, 6 M. & W. 829, the evidence was held insufficient. See further *Mills v. Fowkes*, 5 Bing. N. C. 455; *Moore v. Strong*, 1 Bing. N. C. 442.

The 1st requisite above mentioned involves this also, that the payment be made under circumstances which do not rebut the implication of a promise to pay the balance; because it is only as giving rise to such an implication, and not by any specific effect of its own, that a payment operates, *Wainman v. Kinman*, 1 Exch. 118; yet see *Goddard v. Ingram*, 3 Q. B. 839; [*Ex parte Topping*, 34 L. J. Bankr. 44,] for which reason the payment must also be before action brought, *Bateman v. Pindar*, 3 Q. B. 574, overruling *Yea v. Fouraker*, 2 Burr. 1099.

The 2nd requisite mentioned above has led to a discussion whether, where there are two clear and undisputed debts, either can be taken out of the statute by evidence of a part-payment not specifically appropriated by

the debtor; upon which question the Court of Common Pleas is said to have incidentally expressed an opinion in the negative, *Burn v. Boulton*, 2 C. B. 476; but, it [has since been held] to be [in general] a proper question for the jury, whether the payment was made generally on account of whatever might be due from the debtor at the time, and if so both the debts would be saved. [*Walker v. Butler*, 6 E. & B. 506; and see *Collinson v. Margesson*, *per* Martin, B.] In *Mills v. Fowkes*, it was held that though a creditor has a right to appropriate a payment made generally to an item barred by the Statute of Limitations, still such payment is not a payment on account so as to take the remainder of the demand out of the statute, *Accord. Waller v. Lacy*, 1 Sc. N. R. 186; 1 M. & Gr. 54, S. C.; [*Nash v. Hodgson*, 1 Kay, 650; S. C. on appeal, 6 De G. M. & G., *per* Turner, L. J.; *contra* Knight-Bruce, L. J. In that case the defendant being indebted to the plaintiff on three promissory notes, one of which was for 200*l.*, on application by the plaintiff for payment of interest, paid him 5*l.* on account generally. At the time of the payment the 200*l.* note was the only one of the notes which was not barred by the statute, and the plaintiff appropriated the 5*l.* to payment of interest on that note; and upon the question whether the payment took that note out of the statute,

the Court of Appeal was agreed that it did; but the judgment of Knight-Bruce, L. J., proceeded upon the ground of the appropriation. The Lord Chancellor (Cranworth) said, "The cases show that a simple payment of money does not take a debt out of the statute, and that the payment must be of a smaller sum on account of a larger. What I deduce from them is, that where a payment is made as principal, the effect of it will be to take out of the statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred; and that where there are several debts, the inference will be that the payment is to be attributed to those not barred. What may be the effect where there is a single debt consisting of several items, some of which are barred, and some not, may be doubtful. Exactly the same principle applies if the payment is made in respect of interest. It appears to me that in this case, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred; and if this were not so, the only effect would be to treat it as a payment on account of all, so that in either case the 200*l.* note would be kept alive."

In *Willis v. Newham*, 3 Y. & J. 518, the Court of Exchequer held, that a verbal acknowledgment of

part-payment of a debt was not sufficient proof thereof within this statute; the import of which they construed to be, that in no case should a mere verbal acknowledgment take a case out of the Statute of Limitations, whether that acknowledgment were of the existence of the debt, or of the fact of payment. *Vide Trentham v. Deverill*, 3 Bing. N. C. 397. The authority of *Willis v. Newham* was, however, repeatedly questioned, though it was acted upon in *Bayley v. Ashton*, 12 A. & E. 493; 4 P. & D. 204, S. C.; *Maghee v. O'Neil*, 7 M. & W. 531; *Eastwood v. Savile*, 9 M. & W. 615; *Clark v. Alexander*, 8 Scott, N. R. 147, and the case has been at length overruled in *Cleave v. Jones*, 6 Exch. 573, where the demand was upon a promissory note for 350*l.* and interest, and the Statute of Limitations was saved by evidence of an unsigned entry in the defendant's book in her handwriting "1843, Cleave's interest on 350*l.*—7*l.* 10*s.*" [And see *Edwards v. Jones*, 1 Kay & J. 534.] It was held, even before *Cleave v. Jones*, that written and signed evidence of appropriation may be confirmed by parol, *Bevan v. Gething*, 3 Q. B. 740, and that if the payment be proved as a fact, the appropriation of that payment to the debt which it is sought to take out of the Statute of Limitations may be proved by an admission, *Waters v. Tomkins*, 2 C. M. & R. 726. That action was brought

to recover the amount of five notes, one for 100*l.*, two for 50*l.*, and two for 20*l.* each; the evidence upon an issue joined on plea of *actio non accrevit infra sex annos* was, that within six years the maker, the defendant, on application to him, said, his wife would have called on the holder and paid money on account of the interest on 200*l.*, but for their child's illness; about a fortnight after which, the wife called, and paid 15*s.*, without saying on what account; on another occasion the defendant sent word to the testator that his wife was in Wales, or would have called *with the interest*; and that the wife on other occasions made payments to the testator, who said, at the time, he should be glad if the interest were more regularly paid. This evidence was held to warrant the jury in finding a verdict for the plaintiff. See, too, *Bevan v. Gething*, 3 Q. B. 740, where, however, Coleridge, J., expressed a doubt as to the correctness in principle of *Waters v. Tomkins*. Nor need the writing which is relied on for the purpose of taking a debt out of the operation of the statute specify its amount; that may be proved by parol; *Bird v. Gammon*, 3 Bing. N. C. 888. *Waller v. Lacy*, 1 M. & Gr. 54. 1 Sc. N. R. 186, S. C.; *Dickenson v. Hatfield*, 1 Moo. & R. 141; *Chealey v. Dalby*, 4 You. & Coll. 228; [*Sidwell v. Mason*, 2 H. & N. 306.]

When a bill is given on account of part of a debt, and is paid by the drawee, the statute is not avoided by such payment, though it may be by the delivery of the bill, *Irving v. Veitch*, 3 M. & W. 90; *Turney v. Dodwell*, 3 E. & B. 136. Whether the promise implied from part-payment to the holder of a negotiable instrument is itself negotiable, *quære*. See *Cripps v. Davis*, 12 M. & W. 159. [*Gale v. Capern*, 1 A. & E. 104, *per* Patteson, J.]

An attempt, which proved, however, unsuccessful, was in one case made to oust the defendant of his opportunity of pleading the Statute of Limitations, by averring a payment of interest within six years, in the declaration, instead of giving it in evidence under the replication. The declaration, which was on a promissory note for 127*l.* 10*s.* 8*d.*, payable on demand, *with interest*, after commencing in the ordinary way, proceeded to state that the defendant "disregarded his promise, and did not pay the amount of the note and interest, or any part thereof, *except interest on the said note, at the rate of 5*l.* per cent., from the day of the date of the said note up to a certain day within six years next before the commencement of this suit, to wit, the 26th April, 1830; which interest was, within six years next before the commencement of this suit, to wit, on the last-mentioned day, paid by the defendant to S.*

Davies," as whose executrix the plaintiff sued. Plea, *Actio non accrevit infra sex annos*. Demurrer and joinder. It was contended for the plaintiff, that the payment of interest on the note within six years took the entire demand out of the operation of the Statute of Limitations, and that such payment being averred in the declaration and not traversed, the plea was bad, since it was founded on a statute which the declaration showed to be inapplicable. The court, however, held the plea good, upon the ground that the payment of interest within six years did not necessarily, as a proposition of law, take the debt out of the operation of the statute, but was only evidence whence the jury might infer the continuing existence of the cause of action. "The question is," said the Lord Chief Justice, "whether the first plea as pleaded to this count, is an answer to the whole. What is the whole? A cause of action within six years. Interest, however, as separate from the principal, is not of itself a cause of action, though the payment of it is one mode of evidence to show that, *primâ facie*, a cause of action subsists. That is the legal effect of the payment. The statute 9 G. 4, c. 14, s. 1, has this *proviso*. 'Provided always that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any

person whatsoever.' Since that statute, as before, payment of interest *may* afford an inference that the principal is still due. But how are we to know whether it is so or not, unless we knew the circumstances under which the interest has been paid? I think, therefore, that the declaration discloses only evidence of a cause of action and not any actual cause of action that has not been barred by the plea, and consequently that our judgment must be for the defendant." *Hollis v. Palmer*, 2 Bing. N. C. 713. [For the like reason where the statute was pleaded to an action on a promissory note, a replication that interest had within six years before action been paid on the note, was held bad, *Ridd v. Moggridge*, 2 H. & N. 567.]

Having touched on stat. 9 G. 4, c. 14, it may not be amiss to advert to a case of great importance decided on it, although not immediately bearing upon the point in the principal case, *Whitcomb v. Whiting*. The enactment of the first section of the statute is, as will be recollected, that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, "unless such acknowledgment or promise shall be made or contained in some writing, to be signed by the party chargeable thereby." In consequence of these last words, it has been solemnly decided that an acknowledgment,

signed by an agent in behalf of the debtor, is not sufficient, *Hyde v. Johnson*, 2 Bing. N. C. 777; 3 Scott, 289, S. C. It does not, however, appear from that case, that the agent, who was the party's own wife, was authorised *in writing*; so that perhaps [it was doubtful, until "the Mercantile Law Amendment Act, 1856," s. 13], whether, if a case were to occur, in which an agent authorised *by writing* were to sign a written acknowledgment, this last would not be looked upon as sufficiently connected with the document signed by the principal to satisfy the words of the statute. It must, however, be observed, that the expressions used by the Chief Justice, in *Hyde v. Johnson*, are extremely comprehensive, and seem to militate against such a distinction. "Looking," says his lordship, "at the words of the statute, it is confined in terms to a writing signed by the party chargeable thereby; and as the effect of that statute is, for the first time, to introduce a legislative exception into the statute 21 Jac. I, c. 16; and thereby, *pro tanto*, to repeal it, we do not feel ourselves justified in extending such exception beyond the plain and unambiguous meaning of the words employed therein. The legislature has, in many cases, given equal efficacy to written instruments when signed by the parties, and when signed by their agents; but in all those cases

express words have been employed for that purpose. The Statute of Frauds, in its third section, requires, for the purposes of that section, a note in writing to be signed by the party, 'or their agents thereto lawfully authorised *by writing*;' in the fourth section a memorandum or note in writing is required, 'signed by the party to be charged therewith, or some other person thereto by him lawfully authorised;' in the fifth section, a devise of lands is required to be made in writing, to be signed by the party so devising, 'or by some other person in his presence, and by his express directions;' in the seventh section, a declaration of trusts of any lands shall be in writing, 'signed by the party;' and lastly, the seventeenth section requires, upon the sale of goods, that there shall be some note or memorandum in writing of the bargain, 'signed by the parties to the contract, or their agents thereunto lawfully authorised.' It appears, therefore, that the legislature well knew how to express the distinction not only between a signature by the party, and a signature by his agent, but also to describe the different modes in which agents for different purposes are to be appointed. The same observation arises upon referring to the more recent statutes, 3 & 4 W. 4, c. 27, s. 42, and c. 42, s. 5. When, therefore, we find in the statute now under consideration, that it expressly mentions

the signature of the party only, we think it a safer construction to adhere to the precise words of the statute, and that we should be legislating, not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent."

The question just supposed [cannot arise with regard to acknowledgments made after the Mercantile Law Amendment Act, 1856, (the 19 & 20 Vict. c. 98,) for the 14th section of that act enacts, in reference to 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27 (Irish), that "an acknowledgment or promise made or contained by or in a writing, signed by an agent of the party chargeable thereby duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself." The same question might, however, be raised on the construction of some other enactments, for instance, the 5th and 6th sections of 9 Geo. 4, c. 14, and the 5th and 7th sections of the Statute of Frauds, and] if it were to be mooted, a good deal would depend upon the wording of the agent's written authority. Supposing, by that authority, A. were to direct the agent "to investigate the account between himself and B., and to acknowledge the balance, if any should appear to be due;" it possibly might be urged that the acknow-

ledgment, when made and signed by the agent, would, if it referred in terms to the authority, be incorporated by reference thereto, in the same way that the instrument by which a power is executed, becomes, in contemplation of law, part of the deed by which the power was created. Supposing that, in the case just put, the written acknowledgment by the agent were to be held sufficiently connected with the signature of the principal to satisfy the exigency of the statute, might it not be urged with some plausibility that, as *omne majus continet in se minus*, less effect could not be given to the signature of an agent acting under a general authority? It may be observed, too, that the policy of the act would by no means militate against such arguments, for the object of the statute was to prevent a claim from being made out after the lapse of a number of years by mere *parol* testimony; an object which is by no means defeated by allowing it to be made out by any number of *written* documents, no matter by whom signed, provided there be written evidence to show that they all emanate from the party to be charged, and are clothed with his assent. Thus, under the Statute of Frauds, the policy of which is similar to that of 9 Geo. 4, c. 14, the contract may be contained by any number of writings, provided they can be connected in sense, without the

interposition of parol evidence, *Cobbold v. Caston*, 1 Bing. 399; *Jackson v. Lowe*, *ibid.* 9; *Phillimore v. Barry*, 1 Camp. 513; *Saunderson v. Jackson*, 2 B. & P. 238. Suppose A. were in writing to acknowledge a debt due from B. to C., and B. were afterwards by writing signed expressly to approve of that acknowledgment; would not such an approval be sufficient to take the debt out of the operation of the statute? May it not be contended that the maxim *omnis ratihabitio retrotrahitur et mandato equiparatur* is convertible, and that, if such a subsequent approval by B. would suffice, a previous authority, similarly signed, would suffice also? In the more recent case of *Clark v. Alexander*, 8 Sc. N. R. 147; *Hyde v. Johnson* was recognised and acted upon, and it was made a question—which, however, the state of facts rendered it unnecessary to decide—whether a written acknowledgment made and signed by one of several partners, stands upon a different footing from a written acknowledgment made and signed by one of several ordinary joint contractors, which is provided for by the act 9 Geo. 4, c. 14,—a question which, when it

comes to be solemnly discussed, there may not be found much difficulty in answering in the negative.

There is in the 9 Geo. 4, c. 14, a proviso, that “no memorandum or other writing made necessary by this act shall be deemed to be an agreement within any Stamp Act.” The effect of this appears to be to render the stamp unnecessary where the agreement is put in merely for the purpose of avoiding the Statute of Limitations, the debt having been proved *aliunde*. But if it were put in as the only evidence of a debt though more than six years old, *semble* that it would require a stamp, *Morris v. Dixon*, 4 A. & E. 845. The proviso has been held to be inapplicable to the case of an unstamped promissory note, *Jones v. Ryder*, 4 M. & W. 32.

[An acknowledgment of a simple contract debt is insufficient to save the statute, unless made to the creditor or his agent, *Fuller v. Redman*, 26 Beav. 614; but an acknowledgment of a specialty debt will suffice, under 3 & 4 Will. 4, c. 42, s. 5, though made to a stranger, *Moodie v. Bannister*, 4 Drewr. 432.]

BRISTOW v. WRIGHT.

EASTER.—21 GEO. 3, B. R.

[REPORTED DOUGL. 665.]

In an action against the sheriff for taking goods without leaving a year's rent, the declaration needs not state all the particulars of the demise, but if it does, and they are not proved as stated, there shall be a nonsuit.

IN last Hilary Term, on Thursday, the 25th of January, Lee obtained a rule to show cause why the verdict which had been found for the plaintiff should not be set aside and a new trial granted, or a nonsuit entered.

This was an action on the case, against the defendants as sheriff of *Middlesex*,* on the statute of 8 Ann. c. 14, s. 1, for taking the goods of one Pope in execution, in a house let from year to year by the plaintiff to Pope, without paying or contenting him for a year's rent then due, and of which the defendants, before the removal of the goods, had notice.

* The two Sheriffs of London make one Sheriff of Middlesex, *Barker v. Weedon*, 4 Tyrwh. 861.

The declaration stated the demise, as follows :—

“The said plaintiff, on, &c., demised to one Benjamin Pope, a certain messuage, &c., to have and to hold unto the said Benjamin, from the feast of St. Michael, then next following, for and during the term of one year from thence next ensuing, and fully to be complete and ended, and so, from year to year, for so long as it should please the plaintiff, and the said Benjamin, yielding and paying therefore, yearly and every year during the said term, unto the plaintiff, the yearly rent or sum of, &c., by four even and equal quarterly payments; to wit, at the feast of, &c.”

The principal witness called on the part of the plaintiff was Pope himself; who proved that the plaintiff let the house to him, by parol, for a year, and that there was no stipulation about any time or times for the payment of the rent.

It was contended at the trial (which came on before Lord *Mansfield*, at the sittings for *Middlesex*), that, as the plaintiff had laid a demise with a reservation of rent payable quarterly, he was bound to prove it exactly as laid; and that, having failed in that proof, he ought to be nonsuited. His lordship overruled the objection, being then of opinion that enough of the demise as laid had been proved to entitle the plaintiff to his action. The present rule was moved for on the ground of a misdirection.

On Thursday, the 3rd of May, the *Attorney-General* and *Dunning* showed cause, and urged that the contract was not the gist of the action; the material part was, that a year's rent was in arrear, and that having been proved, the plaintiff had shown enough to entitle himself to a verdict.

Wood, on the other side, insisted, that as the plaintiff had set forth the particulars of the contract, he was bound to prove them as laid; and for this he cited an anonymous case in Lord *Raymond*, where, a promise being laid, "to deliver good merchandiseable wheat," and the evidence being of a promise to deliver "good second sort of wheat," Lord *Holt* held the variance to be fatal, and nonsuited the plaintiff (a); the *King v. Nudigate* (b), where, upon a traverse of an office found, the issue being, whether J. S. devised to "J. N. and his heirs" or not, and the jury having found that "J. S." devised "to A. for years, remainder to J. N. in fee," the court adjudged "*quod non devisavit modo et formâ*:" *Sands and Tash v. Ledger* (c), where, in action of debt for rent, the plaintiffs declared on a demise, "for 15*l.* rent per annum," under a power "to make leases for twenty-one years," and the evidence being of a demise "for 15*l.* rent per annum, and three fowls," under a power "to make leases for twenty-one years in possession, and not in reversion, rendering the ancient rent, and not dis-

(a) Bedford Assizes, 12 W. 3, 1 Ld. Raym. 735.

(b) B. R. E. 6 Car. 1, Sir W. Jones, 224.

(c) Surrey Assizes, 1 Ann. 2 Ld. Raym. 792.

. punishable of waste," Lord *Holt* directed a nonsuit; and *Savage, qui tam, v. Smith*, which was afterwards stated by Lord *Mansfield* in delivering the judgment of the court (*a*).

(*a*) *Infra*, p.
589.

The case stood over till this day.

Lord *Mansfield* (after stating the case).—I am very free to own that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because it is extremely hard on the party to be turned round, and put to expense, from such mistakes of the counsel or attorney he employs. It is hard also on the profession. It was on this ground that I overruled the objection on this case; but I am since convinced, both on the authorities which I am about to mention, and on the reasoning in them, that I was wrong, and that it is better, for the sake of justice, that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are founded in good sense. Their objects are precision and brevity. Nothing is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his ground of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover (*b*). If he states what is impertinent, it is an injury to the other party, and may be struck out and costs allowed, upon motion. I remember a case where, in an action on one covenant, the whole of a very long deed was set forth. The court referred it to the master, and all was struck out except the covenant on which the action was brought, and costs paid to the amount of 100*l*. When I say that the plaintiff needs only set forth that part of a deed on which his action is founded, I do not mean to say that even that is necessary. He is not bound to set forth the material parts in letters and words. It will be sufficient to state the substance and legal effect. This is shorter and not liable to mis-recitals, and literal mistakes. Here that method might have been followed. It certainly was

(*b*) *Vide Cowp.*
665.

not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion), and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the master, on a reference to him, would strike out (irrelevant covenants, for instance), that will be rejected by the court, and need not be proved. But if the very ground of the action is mis-stated, as where you undertake to recite that part of a deed on which the action is founded, and it is mis-recited, that will be fatal. For then the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. This will reconcile all the cases. In the present instance, the plaintiff undertakes to state the lease, and states it falsely. There are many authorities which go to prove this distinction. I will mention three (which are very strong), where matter which it was unnecessary to set forth, being stated, and not proved, the variance was held to be fatal. The first is the case of *Cudlip v. Rundle* (a). There, in an action by a lessor against his tenant, for negligently keeping his fire, by means whereof the house was consumed, a demise to the defendant for seven years was stated in the declaration; the defendant pleaded, that the plaintiff did not demise *modo et forma*; and issue being joined, it appeared on the finding by the jury in a special verdict, to be a lease at will. The Court agreed that the action would have lain against the defendant as tenant at will; but, as the plaintiff had stated him to be a lessee for years, and had proved him tenant at will, the variance was held to be fatal, and there was judgment for the defendant. The next is the case of *Savage, qui tam, v. Smith*, in the Common Pleas (b). That was an action of debt against a sheriff's officer, by an informer. The declaration stated a judgment, and a *fieri facias* upon that judgment. The *fieri facias* was given in evidence, but not the judgment, and the court held, that though it might be unnecessary

(a) B. R. T. 2
W. & M.,
Carth. 202.

(b) T. 16 G. 3,
2 Blackst.
1101.

(a) By a mistake of the press, the word "material" is printed instead of "immaterial," in the report of this case in 2 Blackst. 1104. "Immaterial" certainly was the word used by *De Grey*, Chief Justice, as appears not only from what is here said by *Ld. Mansfield*, but also from a very accurate manuscript note I have seen of *Savage v. Smith*, and indeed from the context in Blackstone's own report.

(b) 19 Geo. 2.

(c) 11 Geo. 2, cap. 19, s. 18.

to aver the judgment, yet, having been averred, it ought to be proved; and my Lord Chief Justice *De Grey* expressly went upon the distinction between immaterial and impertinent averments, and said that the former must be proved, because relative to the point in question (a). The third case is *Shute v. Hornsey*, in this court (b). That was an action for double rent on the statute (c). The declaration stated a lease for three years; but, on the evidence, it appeared that the lease for three years was void under the Statute of Frauds; and that the defendant was only tenant from year to year. This was sufficient for the purpose of the action; but a lease for three years having been laid, and not proved, the plaintiff was nonsuited; and a rule for setting aside the nonsuit having been obtained, it was, upon the argument of the case discharged. These authorities are in point to the doctrine I have laid down. But perhaps, notwithstanding the weight of the cases, if that doctrine were highly detrimental, and the setting it right would be attended with no mischief, as it is only a mode of practice, it might deserve consideration. But I believe it stands right, and upon the best footing; for it may prevent the stuffing of declarations with prolix and unnecessary matter, because of the danger of failing in the proof; and may lead pleaders to confine themselves to state the legal effect. We are all of opinion that the verdict should be set aside, and judgment of nonsuit entered.

The rule made absolute.

"I AM aware," said Mr. Justice Buller, in *Pepin v. Solomons*, 5 T. R. 496, "that the case of *Bristow v. Wright* has been sometimes doubted, but I am still of opinion that it was rightly decided. In order to entitle the plaintiff to maintain that action, it was necessary for him to show that he was

landlord, it being an action for taking the lessee's goods, without leaving a year's rent; and, to show that the plaintiff was the landlord, he was obliged to set forth a contract between himself and the tenant. Now, contracts are in their nature entire, and in pleading they must be stated

accurately; but as the evidence in that case did not accord with the contract stated in the declaration, and which was the foundation of his action, it was properly determined that a judgment of nonsuit should be entered." *Accord. Savage v. Smith*, Blackst. 1101; *Williamson v. Allison*, 2 East, 452, *ubi per* Lord Ellenborough, C.J.—“With respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment may be more particular than it need have been, the whole must be proved or the plaintiff cannot recover.” This, it may be observed, is an expression of the same doctrine that was laid down by Lord Mansfield in the principal case, in the following words:—“The distinction is between that which may be rejected as surplusage and what cannot.” *Accord. Shearm v. Burnard*, 10 A. & E. 593. See *Harris v. Mantle*, 3 T. R. 307, where in covenant the breach was that the defendant had not performed his covenant to repair, *but on the contrary had committed waste*. Held that he could prove no non-repair not amounting to waste, for the plaintiff must recover *secundum allegata et pro-*

bata. [See *The Times Fire Assurance Co. v. Hawke*, 28 L. J. Exch. 317; *Carpenter v. Parker*, 3 C. B. N. S. 206.] See, too, *Hawkes v. Orton*, 5 A. & E. 367; *East v. Skinner*, 11 M. & W. 161; and *Alexander v. Bonnin*, 4 Bing. N. C. 799; where to trespass *qu. c. f.* the defendant pleaded that he had licence to *erect and maintain* a brick wall on the *locus in quo*, and having proved a licence to *erect* but not to *maintain*, it was held that the verdict on that plea must be entered against him. In *Martin v. Graham*. 7 A. & E. 54, the declaration alleged that “the defendant cut down trees, and otherwise used the premises in so untenantlike and improper a manner, that they became and were dilapidated.” Held, that he could not give evidence of *permissive waste*.—On the other hand, see *Wells v. Hopkins*, 5 M. & W. 7; where in an action on a bill, the defendant pleaded that it was accepted for hops to be delivered according to sample, and that the plaintiff had not delivered hops according to sample, *or any hops whatever*, the words in italics were rejected as surplusage, and in *Davis v. Chapman*, 2 M. & Gr. 920, where to a count for an escape, the plea after stating a return of the debtor into custody, alleged *that he was still kept in it*, that allegation was held surplusage upon a replication *de injuriâ*; [and see *Swinfen v.*

Lord Chelmsford, 5 H. & N. 920, 921.]

Upon this doctrine appears mainly to depend the real utility of the *videlicet*, or *to wit*, so often introduced by pleaders before matter of description; a precaution which is totally useless where the statement placed after the *videlicet* is material; but which in other cases prevents the danger of a variance, by separating the description from the material averment, so that the former, if not proved, may be rejected, without mutilating the sentence which contains the latter. See *Symons v. Knox*, 3 T. R. 68. Thus in *Lumpleigh v. Braithwait*, *ante*, p. 139, it is laid down by the court, that under the averment, *that the plaintiff did his endeavour, videlicet, in equitando*, it would not have been necessary to prove *riding*, but any other endeavour would have served; see *Parkinson v. Whitehead*, 2 M. & Gr. 329; *per* Wightman, J., in *Atkinson v. Raleigh*, 3 Q. B. 88; *per* Tindal, C. J., in *King v. Green*, 6 Scott. N. R. 869; *Cooper v. Blick*, 3 Q. B. 915; *Newlands v. Holmes*, 3 Q. B. 682.

Bristow v. Wright continued long to be the leading case upon the subject of variance; the subsequent decisions will be found collected and ably commented upon in the notes to *Goram v. Sweeting*, 2 Wms. Saund. 199, and will all be found to bear out and exemplify Lord Mansfield's doc-

trine. But the law respecting variances has, since the decision of *Bristow v. Wright*, received [most extensive and] beneficial alterations from the legislature. In order to understand these perfectly, it will be necessary to occupy the reader in something like an historical disquisition, [but it should be premised that the Common Law Procedure Acts, 1852, 1854, and 1860, have practically superseded all previous enactments by which powers of amendment in civil causes have been given.] After the decision in *Bristow v. Wright* had pointed out in glaring colours the fatal nature of a variance, the pleaders, naturally terrified at the idea of incurring a nonsuit in consequence of a mistake in stating facts, of which their clients had, perhaps, furnished them with no very accurate account, began to swell their declarations to an extraordinary and portentous size, by introducing counts calculated to meet every aspect which it was supposed that the evidence could at the trial possibly assume, in hopes that some one count, at least, would be found free from any material variance. While, on the other hand, the pleader for the defendant was equally astute in framing a variety of pleas, in order to meet every possible defence upon which the evidence might enable counsel to rely at the trial. Yet, notwithstanding all these pains, it was often found

at *Nisi Prius*, that the case assumed some shape which the ingenuity of the pleader had not been able to divine; and the suitor, after incurring great expense, was defeated at the moment when the merits of his case were rendered apparent by the same evidence which created the variance between it and the statements contained in his pleading.

In order, in some degree, to obviate these mischiefs, stat. 9 G. 4, cap. 15, after reciting "that great expense was often incurred and delay or failure of justice took place at trials, by reason of variances between *writings produced in evidence and the recital or setting forth thereof upon the record* on which the trial was had, in matters not material to the merits of the case," enacted "that it should and might be lawful for every court of record holding plea in civil actions, any judge sitting at *Nisi Prius*, and any court of *oyer and terminer* and general gaol delivery in England, Wales, Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such court or judge, *in any civil action, or in any indictment or information for any misdemeanor*, when any variance shall appear between any matter in writing, or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon such trial is pending, to

be forthwith amended in such particular, by some officer of the court, on payment of such costs, if any, to the other party, as such court or judge shall think reasonable; and, thereupon, the trial shall proceed as if no such variance had appeared; and, in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly." The powers of amendment given by this statute were subsequently extended to indictments and informations for *all offences whatever*, 11 & 12 Vict. c. 46, s. 4, and see 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, s. 1.

The effects of the 9 G. 4, c. 15, though limited to one class of cases, being found beneficial, it was determined to extend its enactments, and at the same time to compel the parties who were to have the advantage of the increased facility of amendment to co-operate with the legislature in reducing the expense of actions, by diminishing the length of their pleadings. Accordingly, statute 3 & 4 W. 4, c. 42, s. 23, reciting "that great expense is often incurred, and delay or failure of justice takes place at trials by reason of variances, as to some particular or particulars, between

the proof and the record or setting forth, on the record or document on which the trial is had of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot, in any case, be amended at the trial, except where the variance is between any matter in writing or in print, produced in evidence, and the record," enacts "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear *between the proof and the recital, or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence*, to be forthwith amended by some officer of the court or otherwise, both in the part of the

pleadings in which such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to the payment of costs to the other party, or postponing the trial to be had before the same, or another, jury, or both payment of costs and postponement, as such court or judge shall think reasonable;—and in case such variance shall be in some particular or particulars, in the judgment of such court or judge, *not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence*, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record, or postponing the trial as aforesaid, as such court or judge shall think reasonable; and, after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, or by virtue of such writ as aforesaid (*alluding to the writ of trial given by ss. 17 & 18*), the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned together with the record

or writ; and, thereupon, such papers, rolls, and other records of the court, from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and, in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had. Provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit; or the court shall make such other order as to them shall seem meet." And it is further enacted by section 24, "that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts, according to the evidence; and thereupon such finding shall be stated on such record or document; and notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall if they shall think the said variance im-

material to the merits of the case, and the mis-statements such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case." This section does not it seems apply to feigned issues, *Brown v. Hutchinson*, 13 Q. B. 185.

This statute does not repeal the 9 G. 4, c. 15; a circumstance which it was formerly material to remember, for the power of amendment given by that statute extends to "any civil action, or any indictment or information for any misdemeanor;" whereas the 3 & 4 W. 4, c. 42, only includes "civil actions, informations in the nature of a *quo warranto*, and proceedings on writs of *mandamus*." An indictment for misdemeanor could, therefore, be amended at the trial in any particular falling within the 9 G. 4, c. 15, though it certainly is not included in the purview of the 3 & 4 W. 4, c. 42. Since the 14 & 15 Vict. c. 100, s. 1, this has ceased to be of importance, that statute giving very large powers of amendment in all criminal cases.

Another difference between the 9 G. 4, c. 15, and the 3 & 4 W. 4, c. 42, as pointed out by Tindal, C. J., in *Smith v. Brandram*, 2 M. & G. 250, 2 Sc. N. R. 539, S. C., is that the former does not, in the enacting part, expressly restrict the power of amending to those cases only where the defect

to be amended is "*not material to the merits of the case*;" those words, as observed by Maule, J., S. C., though occurring in the recital, not being repeated in the enacting clause; but, with submission, it seems that the discretion of the judge ought in each case to be so limited by a just view of the circumstances, as, even without the guidance of those words, to avoid perilling the merits by an amendment under either statute. So, it has been suggested that on the trial of an issue upon a plea of *nul tiel record*, a variance between the pleading and the record produced, would be amendable under the 9 G. 4, c. 15, although not so under 3 & 4 W. 4, c. 42, *Hopkins v. Francis*, 13 M. & W. 668, *per* Alderson, B.; but see *Davis v. Dunne*, 1 Dowl. N. S. 31; and an amendment would now be allowed upon a trial by the record, at all events under the 222nd section of the Common Law Procedure Amendment Act, 1852, *Noble v. Chapman*, 14 C. B. 400; *Hunter v. Emanuel*, 15 C. B. 290.

The judges seem [to have been] disposed to give a *very liberal construction to this statute*, [the 3 & 4 W. 4, c. 42,] and it [was] announced that leave to amend under it [would] not be refused on account of the supposed hardship or impropriety of the action, *Doe dem. Marriott v. Edwards*, 1 M. & R. 321, Parke, B.; but Alderson, B., refused to amend in ejectment where a recovery would

disturb an equitable arrangement to which the real plaintiff had been a party. *Doe d. Loscombe v. Clifford*, 2 Car. & K. 448. "Unless," said Parke, B., in *Sainsbury v. Matthews*, 4 M. & W. 347, "the judges are very liberal in the allowance of amendments, the rule which binds a plaintiff to one count will operate very harshly." See to the same effect *per* Alderson, B., in *Parry v. Fairhurst*, 5 Tyrw. 685; 2 C. M. & R. 191, S. C.; and *per* Tindal, C. J., Maule and Bosanquet, JJ., *Smith v. Knowelden*, 2 M. & G. 561. The power to amend under the statute being confined to variances, "*not material to the merits of the case*," (meaning thereby not merely legal merits on demurrer, but such as are required in an affidavit of merits, *per* Alderson, B., 5 M. & W. 429) [see *The Pacific Steam Navigation Co. v. Lewis*, 16 M. & W. 783, Pollock, C. B.] the propriety of an amendment must, in each case, depend on its own peculiar circumstances.

To lay down any rule, therefore, which should apply to every case would be manifestly impossible, and perhaps the most convenient mode of considering the decisions upon this statute will be to advert in the first instance to those which have *limited* the *jurisdiction* as well as the *discretion* of the courts and judges in acting upon it. It has already been seen that the court above cannot control the *refusal* of the

judge at Nisi Prius to amend, *Doe v. Errington*, *suprà*; nor could the court, under sect. 24, "give judgment according to the right and justice of the case," when the mis-statement which the judge had refused to amend, was one by which the other party might have been prejudiced; nor expunge the indorsement, *Knight v. McDouall*, 12 A. & E. 438.—In *Doe d. Parsons v. Heather*, 8 M. & W. 158, the court expressed an opinion that a judge at Nisi Prius had no power under this statute to supply a *total omission*, such as the omission of a year in the demise in ejectment. So, in replevin, for taking in a house *and brewery*, with an avowry for taking in a house, omitting *the brewery*, Baron Parke held that the omission could not be supplied under this statute, *Bye v. Bower*, 1 Car. & M. 262; and see a previous decision to that effect by the same learned judge, *John v. Currie*, 6 C. & P. 618. But where in an action of trespass with *not guilty* pleaded, it appeared that the date of the writ was omitted in the Nisi Prius record, so that the damages could not be correctly estimated, Parke, B., allowed *the writ itself*, which was produced and proved, *to be annexed to the record*, to supply the date, and the court above held that he was right, and seemed to think that even if the date had been inserted on the record upon proof of the writ itself, it might have been done, there

being something to amend by, *Cox v. Painter*, 7 C. & P. 769, 6 A. & E. 492; and see *Forman v. Davis*, 9 C. & P. 127; *Ernest v. Brown*, 2 Moo. & R. 13.—It seems clear that a judge at Nisi Prius has no power to make an order for the amendment of the record *at a future time* after verdict, *Brashier v. Jackson*, 6 M. & W. 549, because, as observed by Baron Alderson, at page 555, "the jury are to pass their opinion upon the amended record;" and see *Doe d. Bennett v. Long*, 9 C. & P. 773.—Nor could he, under 3 & 4 W. 4, c. 42, make an amendment which would introduce a new contract and a new breach, as, by altering a declaration upon an actual demise into one upon an agreement to demise, and a breach stating an eviction, to one negating title to demise, *Brashier v. Jackson*, *suprà*;—nor could a judge under that statute make an amendment which would occasion a different set of issues, *per Tindal, C. J., Callander v. Dittrich*, 4 M. & G. 90, (see now *post*),—or make the pleading bad in substance, *per Cresswell, J., S. C., Evans v. Powis*, 1 Exch. 601, *Bury v. Blogg*, 12 Q. B. 877,—or introduce entirely new facts, *David v. Preece* 5 Q. B. 440; *Boucher v. Murray*, 6 Q. B. 362; see *Perry v. Watts*, 3 M. & G. 775.—In *Bowers v. Nixon*, 2 Car. & K. 372, Mr. Justice Maule expressed an opinion that the power of amendment [did] not extend to cases where a

party has designedly set forth his own view of the legal effect of an instrument, from which the judge differs, (but see *Whitwill v. Scheer*, 8 A. & E. 301);—and the Court of Queen's Bench doubted whether it could be exercised under this statute where a defendant would thereby be deprived of his motion in arrest of judgment, *Atkinson v. Raleigh*, 3 Q. B. 79.—In *Geckie v. Monck*, 1 Car. & K. 555, the Lord Chief Baron refused an amendment to a plaintiff who had previously obtained a judge's order to make it upon payment of costs, but of which he had not availed himself; and in *Doe d. Poole v. Errington*, 1 Moo. & R. 344, Taunton, J., refused to allow a joint demise by two, to be amended to a several demise by each; see *Prudhomme v. Frazer*, 1 Moo. & R. 435. Where one of several defendants sued in debt was not fixed by the evidence, Alderson, B., refused to strike his name out, *Cooper v. Whitehouse*, 6 C. & P. 545. It would now, however, in ordinary cases be a matter of course to do so under [15 & 16] Vict. c. [76], s. 37. See note to *Rice v. Shute*, ante, p. 510. But whenever the proposed amendment would not, if made, cast an additional burden of proof on the opposite party, or alter the form of the record, so as to make it probable that a different course of pleading would have been adopted had the record been originally framed as amended, the

judges were liberal in the exercise of the power given them by this statute; see the judgment of Baron Rolfe in *Cooke v. Stratford*, 13 M. & W. 387, and *Southee v. Denny*, 1 Exch. 202.

To enter at any length into the particulars of the numerous cases in which amendments have been allowed at Nisi Prius, would be quite beyond the scope of the present note; but some may be usefully referred to, as showing the disposition of the judges to give full effect to these salutary enactments. — Thus, in actions upon *negotiable instruments*, the statement of an instrument declared on as a bill was altered to that of a note; *per* Alderson, B., *Moilliet v. Powell*, 6 C. & P. 233; and the Court of Exchequer has approved of the alteration of the statement of a note as payable "on demand" to one payable "twelve months after date," *Beckett v. Dutton*, 7 M. & W. 157; see *Cooke v. Stratford*, 13 M. & W. 379; *Higgins v. Nicholls*, 7 Dowl. P. C. 551; and under the 9 G. 4, c. 15, a variance in the name of the payee of a bill not being a party to the action, was amended, *Parks v. Edge*, 1 C. & M. 429; but see *Jelf v. Oriel*, 4 C. & P. 22. And an amendment alleging a presentment to the executor of the acceptor instead of the acceptor, was allowed in *Caunt v. Thompson*, 7 C. B. 400.—In an action upon a *guaranty* stated to have been given "in consideration of past ad-

vances by A. & B. (plaintiffs) and that A. & B. would from time to time make advances to Z," that statement was held amendable to the statement of a guaranty in consideration of "advances made and to be made by A. & B. or by any other persons of whom the firm might consist;" and also an allegation of a promise to pay "the plaintiffs" was held amendable to a promise to pay "the plaintiffs, or those who might constitute the firm," *Chapman v. Sutton*, 2 C. B. 634. So a statement that the guaranty was given in consideration of a sale and delivery of goods to S. "to an extent not exceeding 100l.," was held amendable to "in consideration of your supplying S. with goods to the extent of 100l.," *Dimmock v. Sturla*, 14 M. & W. 758, and see *Smith v. Brandram*, 2 M. & G. 244.—In actions upon other contracts, a promise to pay has been altered to a promise to guarantee, *Hanbury v. Ella*, 1 A. & E. 61. So a count for goods bargained and sold, may be amended to a special count for not accepting, per Parke, B., *Jacob v. Kirk*, 2 Moo. & R. 221. And the Court of Exchequer approved of the amendment of a contract stated to be "to build a room, booth, or building, according to certain plans, by the 28th June, 1838," to a contract "to place certain seats or tables, &c. to be completed four or five days before the 25th June, 1838," *Ward v. Pearson*, 5 M. &

W. 16. So the statement of a contract as carriers has been altered to one as wharfingers, *Parry v. Fairhurst*, 2 C. M. & R. 190; see *Hemming v. Parry*, 6 C. & P. 580; see also *Sainsbury v. Matthews*, 4 M. & W. 343; *Read v. Dunsmore*, 9 C. & P. 588; *Ivey v. Young*, 1 Moo. & R. 545; *Boys v. Ancell*, 5 N. C. 390; *Whitwell v. Scheer*, 8 A. & E. 301; *Gurford v. Bayley*, 3 M. & G. 781, 4 Sc. N. R. 398, S. C.; *Nickisson v. Trotter*, 3 M. & W. 130.—And in *Debt* the amount of the penalty of a bond declared on may be amended, *Hill v. Salt*, 2 C. & M. 460.—In *Detinue* the description of the goods has been amended, *Graham v. Grane*, 13 Q. B. 548.—In *Replevin*, the terms of the tenancy in an avowry may be amended in the holding, *Gayler v. Farrant*, 4 N. C. 286, 5 Scott, 701, S. C.; the amount of rent, see *Roberts v. Snell*, 1 M. & G. 577; or by substituting an avowry at common law for one under the statute, S. C. per Tindal, C. J.; see also *Serjeant v. Chafy*, 5 A. & E. 354.—In *Ejectment*, the day of the demise as laid was altered, to suit the right of entry as proved, *Doe d. Edwards v. Leach*, 3 M. & G. 229; *Doe d. Simpson v. Hall*, 5 M. & G. 795; likewise the description of the premises has been amended, *Doe d. Marriott v. Edwards* 1 M. & R. 319. [Now no day of demise need be stated in the writ, see the Common Law Procedure Act, 1852, s. 169, and Sched. (A.) No.

13.]—In actions for *Slander*, the power of amendment under this statute has been frequently used; in *Southee v. Denny*, 1 Exch. 196, one part of the slanderous language as laid was, “there have been many inquests held upon persons who have died *because* he attended them;” and they were altered by amendment to those proved, viz., “that several have died, that he (the plaintiff) had attended, and there have been inquests held upon them,”—and the court approved of the amendment, though pressed with the argument that the defendant might have been able to justify the words as proved, although not those as laid. It was observed however by the court, that no application for a postponement had been made at the trial, and that even striking out the words altered, there remained sufficient to support the declaration; see also *Smith v. Knowelden*, 2 M. & G. 561; *Pater v. Baker*, 3 C. B. 831; *Jenkins v. Phillips*, 9 C. & P. 766, where, it appearing that the words had been spoken in Welsh, but that the words laid were an exact translation of the words spoken, Coleridge, J., allowed the Welsh words to be inserted. See *Foster v. Pointer*, 9 C. & P. 718, a case of *libel*; and *Mark v. Densham*, 1 Moo. & R. 442, a case of false warranty.—In an action *against the sheriff*, a count for an escape may be amended to one for negligently omitting to arrest, *Guest v.*

Elwes, 5 A. & E. 118. In a plea of justification, stating the goods to have been stolen by some “person unknown,” an amendment stating the name was allowed. *Pratt v. Hankey*, 14 Q. B. 190. See *West v. Baxendale*, 9 C. B. 141.—As to amending where there is a *demurrer* on the record, see *Duckworth v. Harrison*, 5 M. & W. 437; *Chanter v. Leese*, 4 M. & W. 295.—It is said to be no objection to an amendment under this statute, that the amount of *damages* may be affected by it, *per* Maule, J., *Smith v. Knowelden*, 2 M. & G. 565. To this enumeration of some of the cases decided upon these statutes, it may be added that whenever the misstatement to be amended is one by which the opposite party may be prejudiced unless a postponement or other terms be imposed, he should apply for such postponement or other terms at the time: and his omission to do so may be taken to show that he really was not prejudiced by the amendment made; see the judgment of the court in *Southee v. Denny*, 1 Exch. 196. As to the *costs* of amending variances, it has been said that if upon the amendment of a declaration the defendant submits to pay whatever is recoverable under the amended declaration, he will be entitled to the costs from the time at which he could have paid the amount into court; but if he insist on going to the jury upon the amended record, he will only be

entitled to the costs of such amendment; *Smith v. Brandram*, 2 M. & G. 244; 2 Sc. N. R. 539, S. C.

Lastly, by the Common Law Procedure Amendment Act, 1852, independently of several sections allowing amendments in particular cases, some of which have been already mentioned, a general power of amendment is given by the 222nd section, which, after reciting that "the power of amendment now vested in the courts and the judges thereof is insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form," proceeds to enact, that, "it shall be lawful for the superior courts of Common Law, and every judge thereof, and any judge sitting at Nisi Prius," [see *Wickes v. Groves*, 2 Jur. N. S. 212,] "at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit," [see *Webster v. Emery*, 10 Exch. 901,] "the real question in controversy between the parties shall be so made." Under this section it has been held that such amendments only

are to be made at Nisi Prius as are necessary to determine the real question which was in controversy between the parties before the trial, and not every question which may suggest itself upon the evidence, and it is for the judge to determine as a matter of fact, what the real question in controversy is, *Wilkin v. Reed*, 15 C. B. 192; [see *Tennyson v. O'Brien*, 5 E. & B. 497; *Lucas v. Tarleton*, 3 H. & N. 116; *Webster v. Emery*, 10 Exch. 901; *Roles v. Davis*, 4 H. & N. 484; *Notman v. Anchor Assurance Co.*, 6 C. B. N. S. 536; *Saunders v. Bate*, 1 H. & N. 402; *May v. Footner*, 5 E. & B. 505; *Horton v. McMurtry*, 29 L. J. Exch. 260, *per* Martin, B.; *Cowan v. Lascelles*, 3 F. & F. 631; *St. Losky v. Green*, 9 C. B. N. S. 370; 30 L. J. C. P. 19.] It has been decided that the court is only bound by the above section, to allow an amendment when the pleadings, by reason of some informality, do not raise the question intended to be raised; and that it is *discretionary* to allow or disallow an entirely new pleading raising a question not already upon the record in any shape: accordingly, in *Ritchie v. Van Gelder*, 9 Exch. 762, after issue had been joined upon a plea of never indebted, the Court of Exchequer refused to allow a plea of illegality of consideration to be added or substituted, although that illegality was sworn to be the real question in controversy. And

it would not perhaps be correct to say, that in any case an amendment under the section is a matter of absolute right, though in cases where it is *bond fide* prayed in aid, to effect the object which it professes to aim at, the amendment will doubtless be treated as a matter of course. Amendments sought for the purpose of enabling the plaintiff, failing his real demand, to recover in respect of some trifling cause of action suggested for the first time in the course of the trial, or to enable the defendant to take advantage of some ungracious defence started at a late period of the cause, could never have been intended to be forced upon the court; and in practice a discretion has been exercised in allowing an amendment under this section, notwithstanding its apparent extent and stringency. [See *Day v. Hemming*, Q. B. 4th June, 1861; *The Times Fire Assurance Co. v. Hawke*, 28 L. J. Exch. 317; *Brennan v. Howard*, 1 H. & N. 138, in which it was laid down that the court in banc has not power to review the decision of a judge at the trial disallowing an amendment, see also *Cawkwell v. Russell*, 26 L. J. Exch. 34: this latter point, however, seems open to discussion; see *Rishworth v. Hughes*, 15th January, 1863, Exch. The same court, in *Martyn v. Williams*, 1 H. & N. 817, where the judge at the trial had allowed an amend-

ment of a declaration, reserving for opinion the question whether it ought to have been made, held that it ought not, because the amendment gave rise to grounds for demurrer to the declaration; and see *Hughes v. Bury*, 1 F. & F. 365.]

It has been questioned whether a judge at Nisi Prius has the power to add an entirely new plea, *Mitchell v. Crasweller*, 13 C. B. 237, [see *Adams v. Smith*, 1 F. & F. 311,] or whether the court after trial possesses such a power, *Charnly v. Grundy*, 14 C. B. 608. The chief justices both of the Queen's Bench and Common Pleas [Lord Campbell and Cockburn, C. J.] have *de facto* exercised such a power at Guildhall; but Parke, B., in a case of *Wood v. The Copper Miners' Co.*, Kingston Spring Assizes, 1854, declined to do so, stating his impression to be that he had it not. [Counts and pleas are now frequently added by the judge at the trial; see *Robson v. Turnbull*, 1 F. & F. 365; *Isaacs v. Pickard*, 1 F. & F. 672; *Hobson v. Cowley*, 27 L. J. Exch. 205; *Myers v. Barrett*, 2 F. & F. 34; *Morris v. Miller*, 2 F. & F. 550; *Dawkins v. Lord Rokeby*, C. P. Middlesex sittings after T.T. 1866.] In the case of *Edwards v. Hodges*, 15 C. B. 477, the court after the trial, upon the argument of a point reserved, allowed a statute omitted in the margin of a plea of not guilty "by statute" to be added. [See also *Burridge v. Nicholetts*, 30 L. J. Exch. 145. In *Wilkin-*

son v. Sharland, 11 Exch. 33, an amendment was allowed to be made in the declaration after judgment and the commencement of proceedings in error; in *Parsons v. Alexander*, 5 E. & B. 263, an amendment was made by the court without the consent of the plaintiff on a motion for judgment *non obstante veredicto*. Where the court under a mistake as to the effect of its judgment caused it to be entered against the party in whose favour it was according to the grounds of the judgment, the error was amended, *Proctor v. Annison*, reported 7 C. B. N. S. 48; see also *Whaley v. Laing*, 3 H. & N. 901; and *Hooper v. Lane*, 6 H. of Lords Cases, 443. As to amendments—of the *postea*, see *Gregory v. Cotterell*, C. S., 5 E. & B. 571, 581; *Smith v. Edge*, 33 L. J. Exch. 9—of particulars of demand, *Cannan v. Reynolds*, 5 E. & B. 501; *Gibbs v. Knightly*, 2 H. & N. 341; *Hodson v. Steers*, 1 F. & F. 484—of a special case under s. 46 of 15 & 46 Vict. c. 239, *Mersey Dock and Harbour Commissioners v. Jones*, 29 L. J. C. P. 239—of the writ, *Leigh v. Baker*, 2 C. B. N. S. 667; *Knight v. Pocock*, 17 C. B. 175; when not allowed to save the Statute of Limitations, *Clark v. Smith*, 2 H. & N. 753; and *Nazer v. Wade*, 1 B. & S. 728; 31 L. J. Q. B. 5, S. C.] An amendment by striking out the name of a defendant falls within s. 37, not s. 222, and should be made and disposed of at the trial,

Robson v. Doyle, 3 E. & B. 396; [*Wickens v. Steel*, 2 C. B. N. S. 488; *Holden v. Ballantyne*, 29 L. J. Q. B. 148.] Amendments have been allowed under s. 222 upon a trial by the record, *Noble v. Chapman*, 14 C. B. 400; *Hunter v. Emanuel*, 15 C. B. 290. [*Buckland v. Johnson*, 15 C. B. 145, and *St. Losky v. Green*, 9 C. B. N. S. 370, afford strong instances of amendments made without costs; and see *Metzner v. Bolton*, 23 L. J. Exch. 130. This section has been extended so as to apply to pleadings and proceedings upon the prerogative writ of mandamus: see 17 & 18 Vict. c. 125, s. 70.] The judges have not power under s. 222 to amend by adding a party to the cause, *Garrard v. Giubelei*, 11 C. B. N. S. 616; affirmed in error, 13 C. B. N. S. 832.

There is besides a provision in the same statute, s. 75 (extending the provisions of one of the repealed rules of Hilary Term, 1834) which prevents the danger of variance in one particular case. It was a well-established doctrine, that where a party prescribed in pleading, and his prescriptive right was traversed, he was bound upon the trial to prove a prescription to the full extent of that which was put in issue. He might indeed prove a larger prescription, and then, as that would have included the prescription traversed, he would have succeeded; but he could never be

admitted to sever the prescription traversed, so as to take a verdict for as much of it as he could prove: but if the issue were on a larger right, and the proof were of a smaller one, he must have altogether failed, upon the ground of a variance between the allegation traversed, and the evidence adduced upon the trial in support of it. 1 Wm. Saund. 269, *in notis*; 1 Camp. 309; *Rogers v. Allen, et notas*; 9 East, 185; 4 Camp. 189. Therefore among other instances, in *Pring v. Henley*, B. N. P. 59, it was held that if the plaintiff in replevin for taking cattle, in answer to an avowry for *damage feasant*, prescribe for common for all commonable cattle, evidence of a right of common for sheep and horses only, would not maintain the issue, though, if he had a general common, and prescribed for common for any particular sort of cattle, it would be good.— And further, notwithstanding the apparently divisible character of pleas of payment and set-off, it was held that the defendant could not obtain a verdict upon part of either, and that if he failed in establishing enough of either to form a complete answer to the action, he must fail altogether upon the issue, being allowed only in reduction of debt or damages so much as he had established in proof, *Tuck v. Tuck*, 5 M. & W. 109; *Kilner v. Bailey, ibid.*, 382; and see *Moore v. Butlin*, 7 A. & E. 595, and *Falcon v. Benn*, 2 Q. B. 314, where the case of *Tuck v. Tuck* was referred to in the judgment without disapprobation. Great objections existed to these decisions, see *Green v. Marsh*, 5 Dowl. 669; *Francis v. Dodsworth*, 4 C. B. 202. These difficulties are obviated by the 75th section of the Common Law Procedure Act, 1852, which enacts “that pleas of payment and set-off, and all other pleadings capable of being construed distributively shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury; a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered.” [Upon the construction of this section, see *Reynolds v. Harris*, 2 C. B. N. S. 287; *Wilkinson v. Kirby*, 15 C. B. 444, 445, *per* Jervis, C. J.; *Chappell v. Davidson*, 18 C. B. 194; *Blagrove v. Bristol Waterworks Co.*, 1 H. & N. 369; *Parr v. Jewell*, 16 C. B. 684, *per* Parke, B.; *Traherne v. Gardner*, 8 E. & B. 161.] The authorities upon the repealed rule of H. T. 1834, will aid in construing it. See *Knight v. Woore*, 3 Bing. N. C. 3; *Phythian v. White*, 3 C. M. & R. 216. As to the effect of a severed verdict on such a plea, see *Knight v. Woore*, 3 Bing. N. C. 534. Though proof of a more extensive

right will now support the claim of a less extensive one, yet the latter, as is obvious, must be such a one as is in contemplation of law capable of being included in the former: thus the claim of a profit *à prendre* does not include that of a mere easement, *Bailey v. Appleyard*, 8 A. & E. 161; and see *Higham v. Rabett*, 5 Bing. N. C. 622. So a right of common over certain commons, for sheep *levant couchant* upon Blackacre, cannot be sustained under a claim for and in respect of Blackacre, to a separate right of *feeding* and *folding* an *unlimited* number of sheep over those commons. *Ivatt v. Mann*, 3 M. & G. 691. See *Paddock v. Forrester*, 3 M. & G. 903; *Anderson v. Chapman*, 5 M. & W. 483; *Drewell v. Towler*, 3 B. & A. 735.

[There are in the Common Law Procedure Acts of 1854 (s. 96), and of 1860 (s. 36), clauses which provide, in substantially the same terms as those used in the 222nd section of the Common Law Procedure Act, 1852, for amendments in proceedings under those acts.]

The danger of a variance was always much diminished by the circumstance that there existed a certain class of allegations which were always held to be distributive and divisible, so that it was not necessary to prove them in their full extent. Thus the allegations of trespass in a declaration, *Wilson v. Lainson*, 5 Dowl. 341; *Routledge*

v. Abbott, 8 A. & E. 592, and of payment in a plea, *Cousins v. Paddon*, 4 Dowl. 488, 5 Tyrw. 535, 2 C. M. & R. 547; *Falcon v. Benn*, 2 Q. B. 314, are divisible, and the plaintiff in the one case and defendant in the other will succeed only for so much as he can prove. And where A. declared that he was possessed of a messuage *and* land, and by reason thereof, entitled to common, he recovered upon proof that he was possessed of land only. *Ricketts v. Solway*, 2 B. & A. 360. But where the action was for trespass to a wall which turned out to be half the plaintiff's and half defendant's, *semble* that the plaintiff could not recover on proof of an injury to his side, *Murly v. Macdermott*, 8 A. & E. 142, the distinction seems to be between claiming too large a right, and claiming the right in respect of, or as applicable to, more than the proof warrants: in the first case, the right itself cannot be divided; but in the other, it is not the right itself which is affected by the proof, but only the subjects in respect of which it is claimed, or to which its exercise is sought to be applied. See *Beardsworth v. Torkington*, 1 Q. B. 782; *Brunton v. Hall*, 1 Q. B. 795; *Drewell v. Towler*, 3 B. & A. 735; [*Cawkwell v. Russell*, 26 L. J. Exch. 34]. The consequence of this distributive mode of reading pleas and declarations is frequently to save the plaintiff from the inconve-

nience of a new assignment: see *Cowling v. Higginson*, 4 M. & W. 245; *Freeman v. Crafts*, 4 M. & W. 4; *James v. Lingham*, 5 Bing. N. C. 553; *Routledge v. Abbott*, 8 A. & E. 592; *Alston v. Mills*, 9 A. & E. 249; *Edwards v. Bond*, 2 F. & F. 817; and see *Smith v. Royston*, 8 M. & W. 385, where it was decided that the declaration in trespass *quare clausum fregit* being divisible, a plea of *liberum tenementum* is satisfied by proof that the place on which the trespasses were committed was the defendant's freehold, though the declaration named a place to part of which the defendant was not entitled.

There is another distinction which frequently prevented injustice from being occasioned by a trifling variance, that, namely, between matter of *description* and matter of *averment*: for though it was necessary to prove the former literally, it was always sufficient that the latter should be proved *substantially*. See *Pope v. Skinner*, Hob. 72, B. N. P. 400; *Forty v. Imber*, 6 East, 434; *Young v. Wright*, 1 Camp. 139; *Stoddart v. Barker*, 3 B. & C. 2; *Saxby v. Wilkin*, 11 M. & W. 622; *Galloway v. Jackson*, 3 M. & G. 960.

By the different legislative provisions above enumerated, the severity of the law relating to variances in *civil cases* has been much alleviated, and very beneficial effects have been produced. In *criminal cases*, however, the

law of variance, as laid down in *Bristow v. Wright*, prevailed in all its pristine severity up to the time of the passing of 14 & 15 Vict. c. 100; except, indeed, that it had received the slight modification produced by Lord Tenterden's Act (extended to all offences by 11 & 12 Vict. c. 46, s. 4, and to the Quarter Sessions by 12 & 13 Vict. c. 45, s. 10), and which has been above stated. Thus, when the prisoner was indicted for stealing "four live tame turkeys," and it turned out that the turkeys had been killed before the prisoner brought them into the county in which he was indicted, it was held that the word *live* was descriptive, and could not be rejected as surplusage, and consequently that he was entitled to his acquittal. *Edward's Case*, Russ. & Ry. 497. So if the name of the prosecutor were stated in the indictment wrongly, as if *Shakespeare* were put for *Shakespeare*, or *M'Cann* for *M'Carn*, the variance would have been fatal. *Jannet's Case*, Russ. & Ry. 351; *Shakespeare's Case*, 10 East, 83; and it is so still, unless an amendment be made at the trial under the 1st section of 14 & 15 Vict. c. 100, *Frost's Case*, 1 Dearsly, 474. Indeed, if the name used were *idem sonans* with the true one, no variance would be held to exist; as if *Segrave* were put for *Seagrave*, *Williams v. Ogle*, 2 Str. 889; and *Benedetto* for *Beneditto* has been considered no variance.

Abitbol v. Benedetto, 2 Taunt. 401.

So, too, if the name of any third person be material to be stated in the indictment, it must be correctly stated, or the variance will, unless amended under the above statute, be fatal; see *Durore's Case*, 1 Leach, 352; *Jenk's Case*, 2 East, P. C. 514; *Deely's Case*, 1 Moody, 303; [*R. v. Welton*, 9 Cox, C. C. 297;] though, if the mention of that third person could be rejected as wholly immaterial, a variance in stating it would not be fatal; *Pye's Case*, 1 Leach, 352, n.; for then the rule laid down in *Bristow v. Wright*, and explained in *Williamson v. Alison*, would apply, viz., that when the whole of an averment may be struck out, without destroying the plaintiff's right of action, it is unnecessary to prove it; which rule is as much applicable to an indictment as to an action; and was expressed as follows by Lord Ellenborough, in *Hunt's Case*, 2 Camp. 585, viz.: "It is a distinction that runs through the whole of the criminal law, that it is enough to prove so much of an indictment as shows the prisoner to have committed a substantive crime therein specified." And therefore it is the common practice to indict a man for stealing several articles, when in fact he has only stolen one, on proof of which the allegation respecting the others is rejected as surplusage, and he is convicted of

the larceny which he has really committed. So it frequently happens that a man is indicted for committing a crime with certain aggravations, as for committing burglary and larceny, or larceny in a dwelling-house, some person therein being put in fear. In such a case, if the allegations in the indictment respecting the matter of aggravation be not proved; as if, in the former case, the theft turn out to have been committed by day, or, in the latter case, not in a dwelling-house, they may be rejected as surplusage, and the defendant may still be found guilty of simple larceny; see *Withal's Case*, 1 Leach, 88; *Etherington's Case*, 2 Leach, 671. This doctrine is exemplified by the case of *R. v. Jones*, 2 B. & A. 611. The act 9 G. 4, c. 41, [lately repealed] provided that no person (not a parish patient) should be taken into any house for the reception of lunatics without a certificate of two medical practitioners. Sect. 30 enacted that any person who should *knowingly, and with intention to deceive*, sign any such certificate, should be guilty of a misdemeanor, and likewise that any physician, surgeon, &c., who *should sign* any such certificate, *without having visited and personally examined the patient*, should be guilty of a misdemeanor. The indictment stated that the defendant, a surgeon, *knowingly, and with intention to deceive*, signed a certifi-

cate required by the act, *without having visited and personally examined the patient*, contrary to the statute. The jury negatived any intention to deceive, and found the defendant guilty, subject to the opinion of the court on a case containing in substance what is above stated. The court held that the conviction was right. "Two species of misdemeanor," said Mr. Justice Taunton, "are constituted by the 20th section of the act. To the offence first described, knowledge and an intention to deceive are essential; but the second clause makes it a substantive offence to certify without having visited, independently of knowledge or intention. The objection to this indictment on the latter clause is, not that the offence is charged with less fulness than was requisite, but with more. But if the averment which has been added to the statutory description of the offence be unnecessary, there is no reason that it should not be rejected. A man may be convicted of manslaughter on an indictment for murder, and of larceny on an indictment for burglary: and where an assault is alleged with certain intents, the party may be found guilty of assaulting, with only one of the intents alleged. These are stronger cases than the present, especially the first two, where the words rejected imply a great aggravation of crime, and call for a much higher punishment." Also by 24 & 25 Vict. c.

96, s. 72, upon an indictment for embezzlement, [the jury may find the prisoner guilty of] a larceny, and *vice versa*, [see *R. v. Gorbett*, 26 L. J. M. C. 47]. And by s. [94], where persons are indicted for receiving jointly, there may be convictions for receiving separately.

But this rule, *viz.*, "that it is sufficient to prove a substantive offence contained in the indictment," was formerly subject to one qualification, *viz.*, that the offence proved must be of the *same degree* as the offence charged in the indictment; for felony and misdemeanor were considered to be offences of so distinct a nature, and so different in their consequences, that they could not by the common law be charged in the same indictment; nor could a man accused of one be convicted of the other. Therefore, if a man were indicted for a misdemeanor, and his offence turned out to be a felony, he must before 14 & 15 Vict. c. 100, s. 2, have been acquitted, and a new bill preferred against him for the graver offence. So where the prisoner was indicted for larceny of a parchment, which turned out to concern the realty, it was contended that he might receive judgment for the trespass of which he had been guilty in taking it. But the court held otherwise, and directed him to be discharged. *Westbeer's Case*, 1 Leach, 14; 2 Str. 1133. To this there was, however, an ex-

ception, created by stat. 7 & 8 Geo. 4, c. 29, s. 53, [see now 24 & 25 Vict. c. 96, s. 88,] which enacted that if a defendant, indicted for obtaining property under false pretences, appeared at the trial to have obtained it in such a manner as amounts to larceny, he shall not be acquitted by reason thereof. But the converse case was not provided for; and therefore, if it turned out that a prisoner indicted for larceny had obtained the property by false pretences, he would be entitled to his acquittal. There was another exception introduced by the stat. 1 Vict. c. 85, s. 11, by which any person indicted for a felony which included an assault, might have been acquitted of the former and found guilty of the latter charge. That statute has, however, been repealed by [the 24 & 25 Vict. c. 96]. The [41st] section of the latter statute, however, allows a conviction for assault with intent to rob, to take place upon an indictment for robbery. And by the 5th section of 14 & 15 Vict. c. 19, upon an indictment for feloniously cutting, the jury, if they acquit of the felony, may find the prisoner guilty of the misdemeanor of unlawfully cutting. Also, by the 12th section, a person tried for misdemeanor is not to be acquitted by reason of the offence turning out to be felony; unless the court think proper to direct a prosecution for the felony. And by [24 & 25 Vict. c. 100, s. 60],

a woman indicted for the felony of child-murder, may be convicted of the misdemeanor of concealment. [Upon an indictment for maliciously and feloniously administering poison, so as to endanger life or inflict grievous bodily harm, the jury may find the prisoner guilty of the misdemeanor of maliciously administering it with intent to injure, aggrieve, or destroy, 24 & 25 Vict. c. 100, s. 25.]

The first section of the statute 14 & 15 Vict. c. 100, very much extends the power of amendment in criminal cases, for after a recital, "Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence: and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his" defence, it enacts that "whenever on the trial of any

indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof—in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment—or in the name or description of any person or persons, or body politic, or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein—or in the name or description of any person or persons, body politic, or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence—or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described—or in the name or description of any matter or thing whatsoever therein named or described—or in the ownership of any property named or described therein—it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according

to the proof, by some officer of the court, or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed together with the indictment among the records of the court: provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognisances of the prosecutor and witnesses, and of the defendant, and his surety or sure-

ties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognisances for that purpose, in such and the same manner as if they were originally bound by their recognisances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn." And the 2nd section enacts, "Every verdict and judgment which shall be given after the making of any amendment under the provisions of this act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made." And the 3rd section enacts, "If it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this act, such record shall be drawn up in the form in which the indictment was afte

such amendment was made, without taking any notice of the fact of such amendment having been made." And by the 25th section, "Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared." Mr. Greaves, in his learned note to this section, (Greaves on Lord Campbell's Acts, 7,) states, that "the following appear to be the sort of variances which are amendable: In an indictment for *bigamy*, a woman described as '*a widow*,' who is proved to be unmarried (*Rex v. Deeley*, R. & M. C. C. R. 303; 4 C. & P. 579), or as '*Ann Gooding*,' where the register described her as '*Sarah Ann Gooding*' (*Reg. v. Gooding*, C. & M. 297). In an indictment for night poaching, describing a wood as '*The Old Walk*,' its real name being '*The Long Walk*' (*Rex v. Owen*, R. & M. C. C. R. 118). In an indictment for stealing '*a cow*,' which was '*a heifer*' (*Cooke's Case*, 1 Leach, 105); '*a sheep*,' which

turned out to be 'a lamb' (*Rex v. Loom*, R. & M. C. C. R. 160), or 'ewe' (*Rex v. Puddifoot*, R. & M. C. C. R. 247); 'a filly,' which was 'a mare' (*Reg. v. E. Jones*, 2 Russ. C. & M. 140); 'a spade,' which turned out to be the iron part without any handle (*Rex v. Stiles*, 2 Russ. C. & M. 109). So in an indictment for a nuisance, by not repairing, or by obstructing a highway, the termini of the highway might be amended (*Regina v. Sturge*, 3 E. & B. 734). So where an indictment alleges a burglary, or housebreaking, in the parish of St. Peter, in the county of W., and it appears that only part of the parish is situate in such county, the indictment might be amended (*Reg. v. Brookes*, 1 C. & M. 543; *Reg. v. Jackson*, 2 Russ. C. & M. 801). Such are some of the instances in which amendments would clearly be right, but it is easy to suggest other cases in which an amendment ought not to be made. Suppose, on the trial of an indictment for stealing *a sheep*, evidence were given of stealing *a cow*, or *vice versa*, or on an indictment for stealing *geese* it were proposed to prove stealing *fowls*; these are cases in which no amendment ought to be made: it is impossible to conceive that the grand jury can have made such a mistake, and the offence, though in law the same, and liable to the same punishment, is obviously as different as if

it were different in law, and liable to a different punishment." [The same learned writer gives several other instances in his edition of "Russell on Crimes and Misdemeanors," ed. 4, vol. 3, pp. 324—328.] In *Regina v. Sturge*, 3 E. & B. 734, it was held that in an indictment relating to a highway, the statement of the termini may be amended. So in larceny, the name of the owner of the property, *R. v. Vincent*, 2 Denison, 464; see *R. v. Frost*, 1 Dearsley, 474. [An amendment by which the quality of the offence charged would be altered from a felony to a misdemeanor has been refused, *Reg. v. Wright*, 2 F. & F. 320.] The amendment must be made before verdict, and cannot be made by the Court for Consideration of Crown Cases Reserved, *id. R. v. Larkin*, 1 Dearsley, 365; [*R. v. Green*, 26 L. J. M. C. 17.] Semble, that as a matter of discretion it ought to be applied for before the counsel for the defendant has addressed the jury, *R. v. Rymers*, 3 Car. & K. 326, Vaughan Williams, J. [See, however, *R. v. Fullarton*, 6 Cox C. C. 194, where it appears to have been made after:] and that it ought to be made before the case goes to the jury, *Frost's Case*, 1 Dearsley, 474; S. C. 24 L. J. M. C. 61.

[By a recent statute, the 22 & 23 Vict. c. 21, the 222nd section of the Common Law Procedure Act, 1852, has been extended to

all suits and proceedings on the revenue side of the Court of Exchequer. Sect. 22 provides that defects in form are not to invalidate pleadings on that side of the court. Under sect. 26, new rules for the practice and new forms for the proceedings in revenue cases have been made by the court. See 6 H. & N. i.]

RUSHTON v. ASPINALL.

TRINITY.—21 GEO. 3.

[REPORTED DOUGL. 679.]

In an action against the indorser of a bill of exchange, if the plaintiff do not allege a demand and refusal by the acceptor on the day when the bill was payable, it is error, and not cured by verdict.—In like manner it is error, and not cured by verdict, if he do not allege notice to the defendant of the refusal by the acceptor. A verdict cures the statement of a title defectively set out, but not of a defective title.

THIS case came on upon a writ of error, from the court of the county palatine of *Lancaster*. In was an action of *assumpsit*. The first count in the declaration, after stating a bill of exchange drawn by one Billinge on one Meyer, dated the 27th of November, 1778, and payable to one Jones or order, three months after date; that Jones had indorsed it to Rushton; and Rushton to Aspinall; proceeded as follows: “which said bill of exchange, so made, subscribed, and indorsed as aforesaid, afterwards, to wit, on the same day and year aforesaid, (*viz.*, the day of the date of the bill,) at *Manchester* aforesaid, was shown and presented to the said Peter Meyer, for his acceptance thereof, and the said Peter Meyer, according to the usage and custom of merchants aforesaid, did then and there accept the same, and promised to pay the said sum of 22*l.* 10*s.* therein mentioned, according to the tenor and effect of the said bill of exchange, and the indorsements thereupon so made as aforesaid; yet the said Peter

Meyer, although afterwards, to wit, the same day and year aforesaid, at *Manchester* aforesaid, requested to pay the said sum of money in the said bill specified, according to the tenor and effect thereof, and of his acceptance thereof, so made as aforesaid, altogether neglected and refused, and still doth neglect and refuse to pay the same, of all which premises the said John Jones, George Billinge, and Peter Meyer, respectively, the same day and year aforesaid, at *Manchester* aforesaid, in the county aforesaid, had notice, *and by reason thereof, and according to the said usage and custom of merchants, the said Thomas Rushton became liable to pay to the said Joseph Aspinall the said sum of money in the said bill of exchange* contained, -according to the tenor and effect thereof, and of the several indorsements so made thereon as aforesaid, and, being so liable, the said Thomas, afterwards to wit, the same day and year last mentioned, at *Manchester* aforesaid, in the county aforesaid, in consideration thereof, undertook, and to the said Joseph then and there faithfully promised to pay to him the said sum of money, in the said bill of exchange contained, according to the tenor and effect thereof, and according to the several indorsements made thereon as aforesaid."

The second count was for another bill for 60*l.*, drawn, indorsed, and accepted by the same parties; and was framed in the same manner with the first.

The last count which was upon an *insimul computasset*, concluded that the said Thomas was found in arrear, and indebted to the said Joseph in the further sum of, &c., "and thereupon, being so found in arrear and indebted as aforesaid, the said Thomas, in consideration thereof, afterwards, to wit, &c., undertook, and to the said Thomas then and there faithfully promised to pay to him the said last sum, when he should be afterwards thereto requested."

There was a general verdict for the plaintiff, and judgment being entered, the record was removed into this court, and the plaintiff in error assigned several errors on the different counts, but which contained only three objec-

tions ; two to the first two counts, and one to the third : viz., 1. That it appeared by the record that the bill was made on the 27th of November, 1778, payable three months after date, and that the payment was demanded of Meyer on the very same 27th of November ; whereas, according to the tenor of the bill, and the custom of merchants, it was not payable, nor the payment demandable of Meyer, until the expiration of three months after the date thereof. 2. That it did not appear that Rushton, to whom the bill was indorsed, and who indorsed it to Aspinall, had any notice of the refusal of Meyer to pay the money in the bill mentioned, when the same was and became due, and had been demanded of him, without which notice the said Thomas Rushton, as an indorser of the said bill of exchange, was not liable by the law of this kingdom, and according to the usage and custom of merchants aforesaid, to the payment of the money therein mentioned, as such indorser of the same bill. 3. That, by the record, it appeared that the promise of the said Thomas Rushton, mentioned in the last count, was made to himself the said Thomas Rushton, and not to the said Joseph Aspinall ; wherefore the said Joseph Aspinall could not have or maintain any action thereof against the said Thomas Rushton.

In the last term, on Friday, the 25th of May, the case was argued by *Chambre* for the plaintiff in error, and *Wood* for the defendant.

Chambre abandoned the objection to the last count, but contended that the other two were fatal. 1. The contract by the indorser to pay the bill was not absolute, he said, but conditional, *i. e.*, in the event of a demand being made on the acceptor at the time of payment, and his refusal. Such demand, therefore, must be made, in order to render the indorser liable. It was a necessary circumstance to entitle the drawer to an action against him, and a plaintiff must in all cases state a sufficient cause of action in his declaration. 2. In like manner the indorser is not liable till after he has had notice of a demand having been made upon the drawer, and of his refusal. How soon

such notice shall be given, what shall or shall not be reasonable time for notice, is a matter for the consideration of the jury; but some notice must be given, and therefore ought to be alleged.

Wood argued, in answer to both objections, that the facts of the demand and notice being circumstances without which the jury could not have found for the plaintiff, they must now be presumed to have been proved, and that the omission to allege them in the declaration could not be taken advantage of after verdict. For this he cited the case of *Hitchin v. Stevens* in Shower (a), where in an action of debt for rent by the bargainee of a reversion, after a verdict for the plaintiff, it was objected, in arrest of judgment, that the plaintiff had not alleged attornment, without which (as the law then stood) he could have no title; "but a rule was taken and agreed by all the court, that, in any case where anything is omitted in the declaration, though it be matter of substance, if it be such as without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment;" and thereupon, after solemn debate, judgment was given for the plaintiff. With regard to the first objection in particular, he continued, that the allegation under a *videlicet*, that the demand of payment was made on the 27th of November, might be rejected as surplusage. This was no more than appeared to have been done in a case of *Sorrel v. Lewin*, reported by Keble (b). There, in an action of *indebitatus assumpsit*, the promise was laid on the 1st of January, 27 Car. 2, which was a day not yet come, and, after verdict, it was held to be cured, because that must have been found on evidence of a promise before the action, and a duty before the promise. And, as to the second objection in this case, although there was no allegation of notice to the indorser, yet it was stated, that he promised to pay, after the acceptor had refused, which he could not be supposed to have done without a knowledge of the refusal by the acceptor.

Chambre, in reply, observed, that the rule mentioned

(a) B. R. M.
4 Car. 2;
Show. 233.

(b) B. R. M.
26 Car. 2;
3 Keb. 354.

by *Wood* could not extend so far as he would carry it, otherwise a writ of error could never be supported, in any case after verdict. The court would intend, that facts imperfectly stated had been completely proved, but they never could presume, that a material fact, which was not at all stated, had been proved. The first objection would not be removed by rejecting the words stating the demand to have been on the day when the bill was drawn, for still the declaration would remain without an allegation of a demand at the time when the bill became due. As to the promise by *Rushton*, that is only considered as inference of law, and no such inference arises, unless it appears by the preceding part of the declaration that he was liable; or, if it is taken as an actual promise, yet it might have been made without notice of the refusal by the acceptor; and if it was, no action could be maintained upon it, because without such notice there would be no consideration.

The court were prepared to have given judgment the last day of Easter Term (Monday the 28th of May), but neither of the counsel in the cause being present when Lord *Mansfield* was obliged to go to the House of Lords, the cause stood over till this day.

Lord *Mansfield*.—The two objections insisted upon are, 1. That the declaration does not allege a demand on the acceptor. 2. That it does not state notice to the defendant, of the acceptor's refusal to pay. The answer was, that, after verdict it must be presumed that those facts were proved at the trial: and our wishes strongly inclined us to support the judgment if we could. But, on looking into the cases, we find the rule to be, that, *where the plaintiff has stated his title or ground of action defectively or inaccurately*, because to entitle him to recover, all the circumstances necessary, 'in form or substance, to complete the title so imperfectly stated, must be proved at the trial, *it is a fair presumption, after a verdict, that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and*

therefore there is no room for presumption. The case cited from Shower comes within this distinction: for the grant of the reversion was stated, which could not have taken effect without attornment, and therefore, that being a necessary ceremony, it was presumed to have been proved. But, in the present case it was not requisite for the plaintiff to prove either the demand on the acceptor or the notice to the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged. If they were presumed to have been proved, no proof at the trial can make good a declaration which contains no ground of action on the face of it. The promise alleged to have been made by the defendant is an inference of law, and the declaration does not contain premises from which such an inference can be drawn.

I see, in a note of a case (a) in this court, in *Easter Term*, 18 Geo. 3, I am stated to have said, "A verdict will not mend the matter where the gist of the case is not laid in the declaration, but it will cure ambiguity;" and there is a strong case in print of an action for keeping a malicious bull (b), where the *scienter* having been omitted in the declaration, it was held bad after verdict. Therefore we are all of opinion, that there should be judgment for the plaintiff in error.

The judgment reversed.

the defendant used the gun for the destruction of game, but the court overruled the objection. Lord Mansfield observed, that, according to one way of pointing, the offence was sufficiently charged, and that such an ambiguity, though it might be a good cause of special demurrer, or an objection to a conviction (as was held in a case of *Rea v. Hunt*), was cured by a verdict.

(b) *Buxenden v. Sharp*, C. B. E. 8 Will. 3; 2 Salk. 662; 3 Salk. 12. [See also *May v. Burdett*, 9 Q. B. 101.]

(a) Cowp. 825, *Avery v. Hoole*. It was an action against an unqualified person for using a gun. The declaration stated that the defendant used a gun, being an engine for the destruction of game. In arrest of judgment, it was objected, that it was not averred that

THE principle on which this case was decided, and which it is commonly cited to establish, *viz.*, that a verdict cures the statement of a title defectively set out (see *Tibbitts v. Yorke*, 4 A. & E. 137), but not of a defective title, is learnedly discussed in the notes to

Stennell v. Hogg, 1 Wms. Saund. 227; see *Hayter v. Moat*, 5 Dowl. 298; 2 M. & W. 56, S. C.; *Galloway v. Jackson*, 3 M. & Gr. 960; 3 Sc. N. R. 753, S. C.; *Harris v. Goodwyn*, 2 M. & Gr. 405; 2 Sc. N. R. 450, S. C.; *Davis v. Black*, 1 Q. B. 900; *Taylor v. Dennie*, 7

A. & E. 409; *France v. White*, 1 M. & Gr. 731; *Sheen v. Rickie*, 5 M. & W. 175. In *Henry v. Burbidge*, 3 Bing. N. C. 501, a count against the drawer of a bill not alleging a promise to pay was held bad on special demurrer, *Acc. Smith v. Cox*, 11 M. & W. 475; and see *Lee v. Welch*, 2 Lord Raym. 1516; 2 Str. 793, S. C.; *Head v. Baldrey*, 6 A. & E. 469; 2 N. & P. 223, *per curiam*. But such a count is good *after verdict*, *Griffith v. Roaborough*, 2 M. & W. 734; 6 Dowl. 135, S. C. See *Chevers v. Parkington*, 6 Dowl. 75; or on a general demurrer, *Stericker v. Barker*, 9 M. & W. 321; and consequently unobjectionable since the Common Law Procedure Act, 1852, sections 49, 50, and 51 [and Sched. (B.), Form. 18]. This may seem, at first sight, inconsistent with the decision in *Hayter v. Moat*, *supra*, that an indebitatus count in assumpsit, not averring in the usual form a promise to pay on request, is bad after verdict. But that case is put upon its true footing in *Brown v. Boorman*, 11 Cl. & Fin. 1, from which it appears that the omission to state an express promise is not fatal after verdict, *if the declaration shows facts which necessarily imply a promise, with a breach of that promise before action*: and *Hayter v. Moat* was there sustained on the ground stated by Parke and Alderson, BB., in the course of the argument, that for want of

the usual averment of a promise to pay on request, the count did not state *debitum solvendum in presenti*, and that it was consistent with the averment of a debt that it was payable after a credit which had not expired. In *Gurney v. Hill*, 2 Dowl. & L. 936, Wightman, J., considered a count on a promissory note not stating when it was to be paid, unobjectionable, even on special demurrer. See also, the common form of declaration on a bond, 2 Chit. Pl. 284, 6th edition, and 315, 7th edition. Since the above act it has been intimated that a count for freight not stated to be "payable," is bad on demurrer, *Place v. Potts*, 8 Exch. 705. But a similar count has been held good after verdict, *Wilkinson v. Sharland*, 10 Exch. 724; see also *Same v. Same*, 11 Exch. 33. And a count upon an account stated, objected to on the like ground, has been held good upon demurrer, as implying an immediate debt, *Fagg v. Nudd*, 3 E. & B. 650.

The want of an allegation of *malice* in an action for arresting without probable cause, is fatal after verdict, *Saxon v. Castle*, 6 A. & E. 660.

Libel.—The words in a letter from the defendant to P. were as follows:—"I have reason to believe that many of the flowers of which I have been robbed are growing on your premises." *Innuendo*, that the plaintiff had been guilty of larceny, had stolen

flowers, plants, and roots, and unlawfully disposed of them to P., and placed them in P.'s garden. *Held*, that after verdict the court would intend that they were flowers capable of being subjects of larceny, *Gardiner v. Williams*, 2 Tyrw. 757.

For other recent cases in which averments have been holden sufficient upon demurrer for reasons which might formerly have been thought more appropriate to aid by verdict, see *Brymer v. Thames Haven Dock Co.*, 5 Exch. 696; *Harold v. Whitaker*, 13 Q. B. 147; see *Fryer v. Combs*, 11 A. & E. 403; *Vigers v. Dean of St. Paul's*, 14 Q. B. 909; *Canham v. Barry*, 15 C. B. 597.

[It is laid down as a clear rule of law that if a declaration contains an allegation capable of being understood in two senses, and if understood in one sense it will sustain the action, and in another it will not, it must, after verdict, be construed in the sense which will sustain the action, *Emmens v. Elderton*, 4 H. of Lords Cases, 624. On demurrer the rule was formerly the other way: "*Ambiguum placitum interpretari debet contra proferentem*," Co. Lit. 303; and see *Gould v. Webb*, 4 E. & B. 933; *Dutton v. Powles*, 30 L. J. Q. B. 169. Recently, however, it has been the fashion to construe pleadings generally demurred to more liberally. In *Goldham v. Edwards*, 16 C. B. 437, affirmed 18 C. B. 399, on a

motion for judgment *non obstante veredicto*, a plea of simony was held to be bad, on the ground that the statements in it did not necessarily show that the contract was simoniacal; and the Court of Exchequer Chamber denied the existence of any distinction in the mode of construing a plea upon a motion for judgment *non obstante veredicto* and upon demurrer.

In *Garton v. The Great Western Rail. Co.*, E. B. & E. 846, to counts for money had and received and on an account stated, the defendants pleaded that no notice of action was given to them pursuant to their special act. By that act the notice of action was required only in cases of actions brought "for anything done or omitted to be done in pursuance" of the act, and the plea was held bad, after verdict for the defendants, for want of an averment that the action was brought for something so done or omitted to be done. Although it is not now a valid objection to a pleading, either on demurrer or after verdict, that the facts are stated too generally,—for instance, in *Beaver v. The Mayor, &c., of Manchester*, 8 E. & B. 44, a plea that "the acts complained of were done under and in pursuance and in exercise of the powers given to the defendants by a certain statute" mentioned in the plea, was held good on demurrer; as in *Brine v. Great Western Rail. Co.*, 31 L. J. Q. B. 101, was a plea that the embankment was made by the

defendants "under and by virtue of certain acts of Parliament"—yet both on demurrer and after verdict, no pleading can be deemed sufficient by reason of an averment of a mere inference of law unless it also contains facts sufficient to support that inference. For instance, in *Brown v. Mallet*, 5 C. B. N. S. 599 (on demurrer), and in *Seymour v. Maddox*, 16 Q. B. 327 (on motion in arrest of judgment), declarations containing an allegation that "thereupon it became the defendants' duty" to do certain acts, were held to be bad because the facts stated did not establish the existence of the alleged duties. In a modern case a corporation pleaded generally to an action for breach of contract "that the contract mentioned in the declaration was entered into contrary to the purposes for which the defendants were incorporated, and the defendants could not lawfully enter into such contract, whereby the same was void and of no effect." The court held this plea to be bad on demurrer, the agreement as set out in the declaration appearing to be valid, *The South Wales Co. v. Redmond*,

C. P. 30th May, 1861, MSS., and reported 10 C. B. N. S. 687. One of the learned judges added, that, in his opinion, even if the plea was intended to allege that there was something out of the record which made the contract void in law, the plea was bad for being framed so as improperly to leave that question to the jury as matter of law, instead of setting out the specific facts relied upon, so that the court might see whether, in point of law, they were such as to affect the validity of the contract. See also *Summers v. Ball*, 8 M. & W. 596, where a plea that a debt was not contracted within the meaning of the covenant sued upon was held bad, as being a traverse of a matter of law.

There is in the Common Law Procedure Act, 1852, s. 143, a provision which enables a party whose pleadings are objected to on motion in arrest of judgment, or for judgment *non obstante veredicto*, on the ground of the omission of some material fact, to suggest, by leave of the court, the existence of that fact.]

MOSTYN v. FABRIGAS.

MICHAELMAS.—15 GEO. 3, B. R.

[REPORTED COWP. 161.]

Trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for such injury committed by him in Minorca.

If the imprisonment was justifiable the governor must plead his authority specially.

See *Briant v. Clutton*, 5 Dowl. 66.

ON the 8th of June, in last term, Mr. Justice Gould came personally into court to acknowledge his seal affixed to a bill of exceptions in this case: and errors having been assigned thereupon, they were now argued.

Bill of Exceptions.

This was an action of trespass, brought in the Court of Common Pleas, by Anthony Fabrigas against John Mostyn, for an assault and false imprisonment; in which the plaintiff declared that the defendant on the 1st of September, in the year 1771, with force and arms, &c. made an assault upon the said Anthony at *Minorca*, (*to wit*) at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (*to wit*) for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said Anthony, and compelled him to depart from *Minorca* aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said Anthony from *Minorca* aforesaid, to *Carthagera*, in the dominions of the King of Spain, &c., to the plaintiff's damage of 10,000*l*.

Declaration.

Pleas.

The defendant pleaded, 1st, Not guilty; upon which issue was joined. 2ndly. A special justification, that the defendant at that time, &c., and long before, was governor of the said island of *Minorca*, and during all that time was invested with and did exercise all the powers, privileges, and authorities, civil and military, belonging to the government of the said island of *Minorca*, in parts beyond the seas; and the said Anthony, before the said time when, &c., *to wit*, on the said 1st of September, in the year aforesaid, at the island of *Minorca* aforesaid, was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants of the said island, in breach of the peace; whereupon the said John, so being governor of the said island of *Minorca* as aforesaid, at the same time, when, &c., in order to preserve the peace and government of the said island, was obliged to and did then and there order the said Anthony to be banished from the said island of *Minorca*; and, in order to banish the said Anthony, did then and there gently lay hands upon the said Anthony, and did then and there seize and arrest him, and did keep and detain the said Anthony, before he could be banished from the said island, for a short space of time, *to wit*, for the space of six days then next following; and afterwards, *to wit*, on the 7th of September, in the year aforesaid, at *Minorca* aforesaid, did carry and cause to be carried the said Anthony on board a certain vessel from the island of *Minorca* aforesaid to *Carthagera* aforesaid, as it was lawful for him to do, for the cause aforesaid; which are the same making the said assault upon the said Anthony in the first count of the said declaration mentioned, and beating and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time, in the said first count of the said declaration mentioned, and compelling the said Anthony to depart from *Minorca* aforesaid, and carrying and causing to be carried the said Anthony from *Minorca* to *Carthagera*, in the dominions of the King of *Spain*, whereof the said Anthony has above complained against him, and this he is ready to verify; wherefore he prays judgment, &c., without this,

that the said John was guilty of the said trespass, assault, and imprisonment, at the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, or elsewhere, out of the said island of *Minorca* aforesaid, *Replication de injuriâ suâ propriâ absque tali causâ*. At the trial the jury gave a verdict for the plaintiff, upon both issues, with 3000*l.* damages, and 90*l.* costs. Verdict for plaintiff.

The substance of the evidence, as stated by the bill of exceptions, was as follows: on behalf of the plaintiff, that the defendant at the island of *Minorca* on the 17th of September, 1771, seized the plaintiff, and, without any trial, imprisoned him for the space of six days against his will, and banished him for the space of twelve months from the said island of *Minorca* to *Carthagena* in *Spain*. On behalf of the defendant, that the plaintiff was a native of *Minorca*, and at the time of seizing, imprisoning, and banishing him as aforesaid, was an inhabitant of and residing in the *Arraval* of *St. Phillip's*, in the said island; that *Minorca* was ceded to the crown of *Great Britain*, by the treaty of *Utrecht*, in the year 1713. That the *Minorquins* are in general governed by the *Spanish* laws, but when it serves their purpose plead the *English* laws; that there are certain magistrates, called the Chief Justice Criminal, and the Chief Justice Civil, in the said island: that the said island is divided into four districts, exclusive of the *Arraval* of *St. Phillip's*; which the witness always understood to be separate and distinct from the others, and under the immediate order of the governor; so that no magistrate of *Mahon* could go there to exercise any function, without leave first had from the governor: that the *Arraval* of *St. Phillip's* is surrounded by a line wall on one side, and on the other by the sea, and is called the *Royalty*, where the governor has greater power than anywhere else in the island: and where the judges cannot interfere but by the governor's consent; that nothing can be executed in the *Arraval* but by the governor's leave, and the judges have applied to him, the witness, for the governor's leave to execute process there. That for the trial of murder, and other great offences committed within Evidence.

the said *Arraval*, upon application to the governor, he generally appoints the *assesseur criminel* of *Mahon*, and for lesser offences, the *mustastaph*; and that the said John Mostyn, at the time of the seizing, imprisoning, and banishing the said Anthony, was the governor of the said island of *Minorca*, by virtue of certain letters patent of his present Majesty. Being so governor of the said island, he caused the said Anthony to be seized, imprisoned, and banished, as aforesaid, without any reasonable or probable cause, or any other matter alleged in his plea, or any act tending thereto.

Argument for
plaintiff in
error.

This case was argued this term by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards in Hilary Term, 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

1st question.

For the plaintiff in error. There are two questions, 1st, Whether in any case an action can be maintained in this country for an imprisonment committed at *Minorca*, upon a native of that place?

2nd question.

2ndly. Supposing an action will lie against any other person, whether it can be maintained against the governor acting as such in the peculiar district of the *Arraval* of *St. Phillip's*?

1st question.

In the discussion of both these questions, the constitution of the island of *Minorca*, and of the *Arraval* of *St. Phillip's*, are material. Upon the record it appears, that by the treaty of *Utrecht*, the inhabitants had their own property and laws preserved to them. The record further states that the *Arraval* of *St. Phillip's*, where the present cause of action arose, is subject to the immediate control and order of the governor only, and that no judge of the island can execute any function there, without the particular leave of the governor for that purpose. 1st. If that be so, and the *lex loci* differs from the law of this country; the *lex loci* must decide, and not the law of this country. The case of *Robinson v. Blund*, 2 Bur. 1078, does not interfere with this position; for the doctrine laid down in that case is, that where a transaction is entered

into between *British* subjects with a view to the law of *England*, the law of the place can never be the rule which is to govern. But where an act is done, as in this case, which by the law of *England* would be a crime, but in the country where it is committed is no crime at all, the *lex loci* cannot but be the rule. It was so held by Lord Chief Justice *Pratt*, in the case of *Pons v. Johnson*, and in a like case of *Ballister v. Johnson*, sittings after Trinity Term, 1765. Argument.

2nd. In criminal cases, an offence committed in foreign parts cannot, except by particular statutes, be tried in this country. 1 Vesey, 246, *The East India Company v. Campbell*. If crimes committed abroad cannot be tried here, much less ought civil injuries, because the latter depend upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country, which is justifiable in another. But in crimes, as murder, perjury, and many other offences, the law of most countries take for their basis the law of God, and the law of nature; and, therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases than in civil actions. In *Keilwey*, 202, it was held that the Court of Chancery cannot entertain a suit for dower in the *Isle of Man*, though it is part of the territorial dominions of the crown of *England*. 3rd. The cases where the courts of *Westminster* have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *English* subjects; and even there it is done by a legal fiction; namely, by supposing under a *videlicet*, that the cause of action did arise within this country, and that the place abroad lay either in *London* or in *Islington*. But where it appears upon the face of the record, that the cause of action did arise in foreign parts, there it has been held that the court has no jurisdiction, 2 Lutw. 946. Assault and false imprisonment of the plaintiff, at Fort St. George, in the *East*

Argument.

Indies, in parts beyond the seas; viz., at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*. It was resolved, by the whole court, that the declaration was ill, because the trespass is supposed to be committed at Fort St. George, in parts beyond the seas, *videlicet*, in *London*; which is repugnant and absurd: and it was said, by the Chief Justice, that if a bond bore date at *Paris*, in the kingdom of *France*, it is not triable here. In the present case, it does appear upon the record, that the offence complained of was committed in parts beyond the seas, and the defendant has concluded his plea with a traverse, that he was not guilty in *London*, in the parish of *St. Mary-le-Bow*, or elsewhere out of the island of *Minorca*. Besides it stands admitted by the plaintiff; because if he had thought fit to have denied it, he should have made a new assignment, or have taken issue on the place. Therefore, as Justice *Dodderidge* says, in *Latch*, 4, the court must take notice, that the cause of action arose out of their jurisdiction.

Before the statute of Jeofails, even in cases the most transitory, if the cause of action was laid in *London*, and there was a local justification, as at *Oxford*, the cause must have been tried at *Oxford*, and not in *London*. But the statute of Jeofails does not extend to *Minorca*: therefore, this case stands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man who has regulated his conduct by one law, amenable to another totally opposite. If by the law of *Minorca*, how is it to be proved? There is no legal mode of certifying it, no process to compel the attendance of witnesses, or means to make them answer. The consequence would be to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his

defence without the power of proving either the law or the facts of his case. Argument.

Second point. If an action would lie against any other person, yet it cannot be maintained against the Governor of *Minorca*, acting as such, within the *Arraval* of *St. Phillip's*. 2nd question.

The Governor of *Minorca*, at least within the district of *St. Phillip's*, is absolute : both the civil and criminal jurisdiction vest in him as the supreme power, and as such he is accountable to none but God. But supposing he were not absolute : in this case, the act complained of was done by him in a judicial capacity as criminal judge ; for which no man is answerable. 1 Salk, 396, *Groenvelt v. Burnwell* ; 2 Mod. 218. Show. Parl. Cases, 24, *Dutton v. Howell*, are in point to this position ; but more particularly the last case, where in trespass, assault, and false imprisonment, the defendant justified as Governor of *Barbadoes*, under an order from the council of state in *Barbadoes*, made by himself and the council, against the plaintiff (who was the deputy-governor), for mal-administration in his office ; and the House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action, hold strongly in the present. This is an action brought against the defendant for what he did as judge ; all the records and evidence, which relate to the transaction, are in *Minorca*, and cannot be brought here : the laws there are different from what they are in this country ; and as it is said in the conclusion of that argument, government must be very weak indeed, and the persons entrusted with it very uneasy, if they are subject to be charged with actions here, for what they do in that character in those countries. Therefore, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to show that this action cannot be maintained ; and that the plaintiff in error is entitled to the judgment of the court.

Mr. *Peckham*, for the defendant in error. 1st the Argument for defendant in error.

Argument.

objection to the jurisdiction is now too late ; for wherever a party has once submitted to the jurisdiction of the court, he is for ever after precluded from making any objection to it. Year Book, 22 H. 6, fol. 7 ; Co. Litt. 127, b ; T. Raym. 34 ; 1 Mod. 81 ; 2 Mod. 273 ; 2 Lord Raym. 884 ; 2 Vern, 483.

Secondly. An action of trespass can be brought in *England* for any injury done abroad. It is a transitory action, and may be brought anywhere. Co. Litt. 282 ; 12 Co. 114 ; Co. Litt. 261, b, where Lord *Coke* says, that an obligation made beyond seas, at *Bordeaux*, in *France*, may be sued here in *England*, in what place the plaintiff will. Captain Parker brought an action of trespass and false imprisonment against Lord Clive, for injuries received in *India*, and it was never doubted but that the action did lie. And at this time there is an action depending between Gregory Cojimaul, an *Armenian* merchant, and Governor Verelst, in which the cause of action arose in *Bengal*. A bill was filed by the Governor in the Exchequer for an injunction, which was granted ; but on appeal to the House of Lords, the injunction was dissolved ; therefore, the Supreme Court of Judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in England, though the cause of action arose in *India*.

Thirdly. There is no disability in the plaintiff which incapacitates him from bringing this action. Every person born within the ligeance of the King, though without the realm, is a natural-born subject, and as such, is entitled to sue in the King's courts. Co. Litt. 129. The plaintiff, though born in a conquered country, is a subject, and within the ligeance of the King, 2 Burr. 858.

In 1 Salk. 404, upon a bill to foreclose a mortgage in the island of *Sarke*, the defendants pleaded to the jurisdiction, viz., that the island was governed by the laws of *Normandy*, and that the party ought to sue in the courts of the island, and appeal. But Lord Keeper *Wright* overruled the plea ; "otherwise there might be a failure of justice, if the Chancery could not hold plea in such case,

the party being here." In this case both the parties are upon the spot. In the case of *Ramkissenseat v. Barker*, upon a bill filed against the representatives of the Governor of *Patna*, for money due to him as his *Banyan*; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here. But Lord *Hardwicke* said, "as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court." And he overruled the defendant's plea without hearing one counsel on either side. Argument.

The case of the Countess of *Derby*, *Keilwey*, 202, does not affect the present question; for that was a claim of dower; which is a local action, and cannot, as a transitory action, be tried anywhere. The other cases from *Latch* and *Lutwyche* were either local actions, or questions upon demurrer; therefore, not applicable to the case before the court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true distinction is between transitory and local actions; the former of which may be tried anywhere; the latter cannot, and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of *Mr. Skinner*, referred to the twelve Judges from the council board. In the year 1657, when trade was open to the *East Indies*, he possessed himself of a house and warehouse, which he filled with goods, at *Jamby*, and he purchased of the King at *Great Jamby* the islands of *Baretha*. The agents of the East India Company assaulted his person, seized his warehouse, carried away his goods, and took and possessed themselves of the islands of *Baretha*. Upon this case it was propounded to the Judges, by an order from the King in council, dated the 12th April, 1665, "Whether *Mr. Skinner* could have a full relief in any ordinary court of law?" Their opinion was, "That his Majesty's ordinary courts of justice at *Westminster* can give relief for taking away and spoiling his ship, goods, and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the

Argument.

detaining and possessing of the house and islands in the case mentioned, he is not relievable in any ordinary court of justice." It is manifest from this case that the twelve Judges held, that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a transitory action; but an action could not be maintained for possessing the house and land, because it is a local action.

Fourth point. It is contended that General Mostyn governs as all absolute sovereigns do, and that *stet pro ratione voluntas* is the only rule of his conduct. From whom does the governor derive this despotism? Not from the King, for the King has no such power, and therefore cannot delegate it to another. Many cases have been cited, and much argument has been adduced, to prove that a man is not responsible in an action for what he has done as a judge; and the case of *Dutton v. Howell* has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that *Sir John Dutton* was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of *Barbadoes*, and only let the law take its course against a criminal. But Governor Mostyn neither sat as a military or a civil judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to prosecute the innocent. If that be so, he is responsible for the injury he has done; and so was the opinion of the court of C. B., as delivered by Lord Chief Justice *De Grey*, on the motion for a new trial. If the governor had secured him, said his Lordship, nay, if he had barely committed him, that he might have been amenable to justice: and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a twelvemonth (and the banishment for a year is a continuation of the

original imprisonment), than that he could inflict the torture. Lord *Bellamont's Case*, 2 Salk. 625, Pas. 12 W. 3, is a case in point to show that a governor abroad is responsible here; and the stat. 12 W. 3, passed the same year, for making governors abroad amenable here in criminal cases, affords a strong inference that they were already answerable for civil injuries, or the legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question. *Comyn v. Sabine*, Governor of *Gibraltar*, Mich. 11 Geo. 2. The declaration stated, that the plaintiff was a master carpenter of the office of ordnance at *Gibraltar*; that Governor Sabine tried him by a court-martial, to which he was not subject; that he underwent a sentence of 500 lashes; and that he was compelled to depart from *Gibraltar*, which he laid to his damage of 10,000*l*. The defendant pleaded not guilty, and justified under the sentence of the court-martial. There was a verdict for the plaintiff, with 700*l*. damages. A writ of error was brought, but the judgment affirmed.

With respect to the *Arraval* of *St. Phillip's* being a peculiar district, under the immediate authority of the governor alone, the opinion of Lord Chief Justice *De Grey*, upon the motion for a new trial, is a complete answer: "One of the witnesses in the cause," said his Lordship, "represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative power. It was gross ignorance in that person to imagine such a thing: I may say it was impossible, that a man who lived upon the island in the station he had done, should not know better, than to think that the governor had a civil and criminal power in him. The governor is the King's servant; his commission is from him, and he is to execute the power he is invested with under that commission; which is to execute the laws of *Minorca*, under such regulations as the King shall make in council. It was a vain imagination in the witnesses to say, that there were five terminos in the island of *Minorca*: I have at

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Argument.

various times seen a multitude of authentic documents and papers relative to that island; and I do not believe that, in any one of them, the idea of the *Arraval* of *St. Phillip's* being a distinct jurisdiction was ever started. *Mahon* is one of the four terminos, and *St. Phillip's*, and all the district about it, is comprehended within that termino; but to suppose that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd." Therefore, as the defendant, by pleading in chief, and submitting his cause to the decision of an *English* jury, is too late in his objection to the jurisdiction of the court; as no disability incapacitates the plaintiff from seeking redress here; and as the action which is a transitory one is clearly maintainable in this country, though the cause of action arose abroad, the judgment ought to be affirmed. Should it be reversed, I fear the public, with too much truth, will apply the lines of the Roman satirist, on the drunken Marius, to the present occasion; and they will say of Governor Mostyn, as was formerly said of him,

Hic est damnatus inani judicio;

and to the *Minorquins*, if Mr. Fabrigas should be deprived of that satisfaction in damages, which the jury gave him,

At tu victrix provincia ploras.

Lord *Mansfield*.—Let it stand for another argument. It has been extremely well argued on both sides.

On Friday, 27th January, 1775, it was very ably argued by Mr. Serjeant *Glynn* for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Judgment.

Lord *Mansfield*.—This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment; and part of the complaint made being for banishing him from the island of *Minorca* to *Carthagena* in *Spain*, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose: therefore, he has stated it to be in

Minorca; with a *videlicet*, at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*. Had it not been for that particular requisite, he might have stated it to have been in the county of *Middlesex*. To this declaration the defendant put in two pleas. First, "not guilty"; secondly, that he was Governor of *Minorca*, by letters patent from the crown; that the plaintiff was raising a sedition and mutiny; and that, in consequence of such sedition and mutiny, he did imprison him, and send him out of the island; which, as governor, being invested with all the privileges, rights, &c. of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true: but he denies the truth of the fact: and puts in issue whether the fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of *Minorca*, out of the realm of *England*, and nowhere else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alleged in his plea of justification was given, to show that the *Arraval* of *St. Phillip's*, where the injury complained of was done, was not within either of the four precincts, but is a district of itself, more immediately under the power of the governor; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case, the judge left it to the jury, who found a verdict for the plaintiff, with 3000*l.* damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us: and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the court.

If I understand the counsel for Governor Mostyn right,

Judgment.

what they say is this: The plea of not guilty is totally immaterial; and so is the plea of justification: because upon the plaintiff's own showing it appears, 1st, that the cause of action arose in *Minorca*, out of the realm; 2ndly, that the defendant was Governor of *Minorca*, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued that the judge who tried the cause ought to have refused any evidence whatsoever, and have directed the jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was that the plaintiff, being a *Minorquin*, is incapacitated from bringing an action in the King's courts in *England*. To dispose of that objection at once, I shall only say, it is wisely abandoned to-day; for it is impossible there ever could exist a doubt, but that a subject born in *Minorca* has as good a right to appeal to the King's courts of justice as one who is born within the sound of *Bow* bell; and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of *Utrecht*, makes no difference. The two other grounds are, 1st, That the defendant being Governor of *Minorca* is answerable for no injury whatsoever done by him in that capacity: 2ndly. That the injury being done at *Minorca*, out of the realm, is not cognisable by the King's courts in *England*.—As to the first, nothing is so clear as that to an action of this kind, the defendant, if he has any justification, must plead it: and there is nothing more clear, than that if the court has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. Therefore, by the law of *England*, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country, where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a

superior review, he would be within the reason of the rule which the law of *England* says shall be a justification; but then it must be pleaded.* Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case everything relative to the *Arraval of St. Phillip's*.

Judgment.

* See Salk. 306; Vaugh. 138; 12 C. 24; Lord Raym. 466; 6 T. R. 449; 3 M. & S. 411. See too 1 T. R. 513, 514, 535, 550, 493, 784; 4 Taunt. 67; 2 C. & P. 146; 1 B. & C. 163; 4 B. & C. 292.

The first point, then, upon this ground is, the sacredness of the defendant's person as governor. If it were true that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification; because *prima facie* the court has jurisdiction. But I will not rest the answer upon that only. It has been insisted by way of distinction, that, supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of *England*, yet it shall not emphatically lie against the governor. In answer to which I say, that for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in *Wales*, to bar the remedy sought in this court, you must show the jurisdiction of the court of *Wales*; and in every case to repel the jurisdiction of the King's court, you must show a more proper and more sufficient jurisdiction: for if there is no other mode of trial, that alone will give the King's courts a jurisdiction. Now, in this case no other jurisdiction is shown, even so much as in argument. And if the King's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore locally, during his government, no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment.† But here the injury is said to have happened in the *Arraval of St. Phillip's*, where, without his leave, no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King's courts:

† But see, as to this position, the note, *post*, 662.

Judgment.

because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant *Glynn*, would alone be decisive; and it is this: that though the charge brought against him is for a civil injury, yet it is likewise of a criminal nature; because it is in abuse of the authority delegated to him by the King's letters patent, under the great seal. Now, if everything committed within a dominion is triable by the courts within that dominion, yet the effect or the extent of the King's letters patent, which gave the authority, can only be tried in the King's courts; for no question concerning the seignory can be tried within the seignory itself. Therefore, where a question respecting the seignory arises in the proprietary governments, or between two provinces of *America*, or in the *Isle of Man*, it is cognizable by the King's courts in *England* only. In the case of the *Isle of Man*, it was so decided in the time of Queen Elizabeth, by the chief justice and many of the judges. So that emphatically the governor must be tried in *England*, to see whether he has exercised the authority delegated to him by the letters patent, legally and properly; or whether he has abused it, in violation of the laws of *England*, and the trust so reposed in him.

It does not follow from hence, that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer: and, if the nature of the case would have allowed of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitra-

rily, in which he could not be justified in time of peace. Judgment.

Suppose, during a siege or upon an invasion of *Minorca*, the governor should judge it proper to send a hundred of the inhabitants out of the island, from motives of real and general expediency; or suppose, upon a general suspicion, he should take people up as spies; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known here that by the laws and constitution of *Spain* he was authorised so to act? The way of knowing foreign laws is, by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the law is.* For instance, if there is a *French* settlement, the construction of which depends upon the custom of *Paris*, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated. So in the supreme resort before the King in council, the privy council determines all cases that arise in the plantations, in *Gibraltar*, or *Minorca*, in *Jersey*, or *Guernsey*; and they inform themselves, by having the law stated to them.—As to suggestions with regard to the difficulty of bringing witnesses, the court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission.

If he wants the testimony of witnesses whom he cannot compel to attend, the court may do what this court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she never was married to

* [See now the 24 Vict. c. 11, by which the superior courts of law may, for the purpose of ascertaining the law of a foreign state, send a case to a court of that state.]

Judgment.

him. She alleged a marriage in *Scotland*, but that she could not compel her witness to come up to give evidence. The court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the court of session, or any of the barons of the court of exchequer in *Scotland*, and that the depositions so taken should be read at the trial. And they declared that they would have put off the trial of the indictment from time to time for ever, unless the prosecutor had so consented. The witnesses were so examined before the lord president of the court of session.

* And now, by st. 1 W. 4, c. 22, courts of common law can order the examination of witnesses to be taken in writing whether they reside in a foreign country, a colony, or in England, but under circumstances which disable them from attending to give evidence. See *Doe v. Pat-tison*, 3 Dowl. 35; *Bain v. De Vetrie*, 3 Dowl. 517; *Bridges v. Fisher*, 1 Bing. N. C. 512; *Prince v. Samo*, 4 Dowl. 5; *Bourdeaux v. Rowe*, 1 Bing. N. C. 721; *Dukett v. Williams*, 1 Tyrwh. 502; *Wainwright v. Bland*, 3 Dowl. 653.

It is a matter of course in aid of a trial at law to apply to a court of equity for a commission and injunction in the meantime: and where a real ground is laid, the court will take care that justice is done to the defendant as well as to the plaintiff.* Therefore, in every light in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable nowhere, for the King in council has no jurisdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commission which he holds during the pleasure of the crown. But if he is in *England*, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an *English* court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his majesty's subjects, both in their liberty and property with impunity, is a doctrine that cannot be maintained.

In Lord *Bellamont's* case, 2 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at bar, and granted because the Attorney-General was to defend it on the part of the King; which shows plainly that such an action existed. And in *Way v. Yally*, 6 Mod. 195, Justice

Powell says, that an action of false imprisonment has been brought here against a governor of *Jamaica*, for an imprisonment there, and the laws of the country were given in evidence. The governor of *Jamaica* in that case never thought that he was not amenable. He defended himself, and possibly showed, by the laws of the country, an Act of the Assembly which justified that imprisonment, and the Court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried.—I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery against Governor Sabine, who was governor of *Gibraltar*, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie ; and it being proved at the trial, that the tradesmen who follow the train are not liable to martial law, the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence ; and gave 500*l.* damages.

The next objection which has been made is a general objection, with regard to the matter arising abroad ; namely, that as the cause of action arose abroad, it cannot be tried here in *England*.

There is a formal and a substantial distinction as to the locality of trials. I state them as different things : the substantial distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments where possession is to be delivered by the sheriff of the county ; and as trials in *England* are in particular counties, the officers are county officers ; therefore the judgment could not have effect, if the action was not laid in the proper county.*

With regard to matters that arise out of the realm, there is a substantial distinction of locality too ; for there are some cases that arise out of the realm which ought

* [See now the Common Law Procedure Act, 1852, s. 183.]

Judgment.

† [But see *Scott v. Lord Seymour*, 1 H. & C. 214.] It seems that the words *contra pacem* were not necessary in a declaration of trespass even before the Common Law Procedure Amendment Act, 1852, for the fine to the king had been abolished, and though in *Day v. Musket*, L. Raym. 985, Lord *Holt* said that it was not the *contra pacem*, but the *vi et armis*, that may now be omitted, yet *quare* whether they can be held to stand on a different footing, see Com. Di. Pleader, 3 M. 8, and whether the doubt expressed by Lord *Mansfield* be well founded, see *post*, 656.

not to be tried anywhere but in the country where they arise ; as in the case alluded to by Serjeant *Walker*: if two persons fight in *France*, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here ; because, though it is not a criminal prosecution, it must be laid to be against the peace of the king † ; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only and not of damages, there might be a solid distinction of locality.

But there is likewise a formal distinction, which arises from the mode of trial : for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad : but the law makes a distinction between transitory actions and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county—the place is not material ; and if an imprisonment in *Middlesex*, it may be laid in *Surrey*, and though proved to be done in *Middlesex*, the place not being material, it does not at all prevent the plaintiff recovering damages : the place of transitory actions is never material, except where by particular Acts of Parliament it is made so ; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the *venue* ; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise

abroad may be laid as happening in an *English* county. Judgment.
 But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at *Westminster* in *Middlesex*, and upon producing the deed, it bears date at *Bengal*, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. There is some confusion in the books upon the stat. 6 Rich. 2. But I do not put the objection upon that statute. I rest it singly upon this ground: if the true date or description of the bond is not stated, it is at variance. But the law has in that case invented a fiction; and has said the party shall first set out the description truly, and then give a *venue* only for form, and for the sake of trial by a *videlicet*, in the county of *Middlesex*, or any other county. But no judge ever thought that when the declaration said in *Fort St. George*, viz., in *Cheapside*, that the plaintiff meant it was in *Cheapside*. It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, *that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted*.* Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the case shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the *teste* of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation: because the fiction was invented for the furtherance of justice and to make the writ appear right in form. But where the true time of suing out a *latitat* is material, as on a plea of *non assumpsit infra sex annos*, there it may be shown that the *latitat* was

[* Cited by
Eramwell, B.,
A.-G. v. Kent,
 31 L. J. 397
Holmes v.
Reg. 31 L.
J. Cha. 58.]

Judgment.

sued out after the six years, notwithstanding the *teste*. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to say, that as men they have one way of thinking, and as judges they have another, which is an absurdity; whereas in fact they only meant to support the fiction. I will mention a case or two to show that this is the meaning of it.

In 6 Mod. 228, the case of *Roberts v. Harnage* is thus stated: The plaintiff declared that the defendant became bound to him at *Fort St. David's* in the *East Indies* at *London*, in such bond; upon demurrer the objection was that the bond appeared to have been sealed and delivered at *Fort St. David's* in the *East Indies*, and therefore the date made it local, and, by consequence, the declaration ought to have been of a bond made at *Fort St. David's*, in the *East Indies*, viz., at *Islington* in the county of *Middlesex*; or in such a ward or parish in *London*: and of that opinion was the whole court. This is an inaccurate state of the case. But in 2 Lord Raym. 1042, it is more truly reported, and stated as follows: it appeared by the declaration, that the bond was made at *London* in the ward of *Cheap*; upon oyer, the bond was set out, and it appeared upon the face of it to be dated at *Fort St. George* in the *East Indies*; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the court said that it would have been good if laid at *Fort St. George* in the *East Indies*, to wit, at *London*, in the ward of *Cheap*. The objection there was, that they had laid it falsely; for they had laid the bond as made at *London*; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from *Latch*, and a case from *Lutwyche*, on the former argument, but I will mention a case posterior in point of time, where both those cases were cited, and no regard at all paid to them; and that is the case of *Parker v. Crook*, 10 Mod. 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is said

in the declaration to continue at *Fort St. George*, in the Judgment.
East Indies : and upon the oyer of the deed it bore date at *Fort St. George*, and therefore the court, as was pretended, had no jurisdiction : Latch, fol. 4, Lutwyche, 950. Lord Chief Justice *Parker* said, that an action will lie in *England* upon a deed dated in foreign parts ; or else the party can have no remedy ; but then in the declaration a place in *England* must be alleged *pro formâ*. Generally speaking, the deed, upon the oyer of it, must be consistent with the declaration : but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded ; and here the contract being of a voyage which was to be performed from *Fort St. George* to *Great Britain*, does import, that *Fort St. George* is different from *Great Britain* ; and after taking time to consider of it in Hilary term, the plaintiff had his judgment, notwithstanding the objection. Therefore, the whole amounts to this ; that where the action is substantially such a one as the court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county, matter of form is added to the fiction, to say it is in that county, and then the whole of the inquiry is, whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts which follow the persons, but for injuries done by subject to subject ; especially for injuries, where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court ? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in *Middlesex*, and then proves it to be done a thousand leagues distant on the other side of the *Atlantic*. There are cases of offences on the high seas where it is of necessity to lay in the declaration that it was done upon the high seas ; as the taking a ship. There is a case of

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that sort occurs to my memory ; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice *Lee*, and another before me, in which I quoted that determination, to show that when the lords commissioners of prizes have given judgment, that is conclusive in the action ; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration that the ship was taken, or seized on the high seas, *videlicet*, in *Cheapside*. But it cannot be seriously contended that the judge and jury who try the cause fancy the ship is sailing in *Cheapside* : no, the plain sense of it is that, as an action lies in *England* for the ship which was taken on the high seas, *Cheapside* is named as a *venue* ; which is saying no more than that the party prays the action may be tried in *London*. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by *Armenian* merchants, for assaults and trespasses in the *East Indies*, and they are very strong authorities. Serjeant *Glynn* said, that the defendant, Mr. *Verelst*, was very ably assisted ; so he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this case had been argued once ; yet the counsel did not think it could be supported. Mr. *Verelst* would have been glad to make the objection ; he would not have left it to a jury, if he could have stopped them short, and said, You shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions ; that is, going to cases which in *England* would be local actions ; I remember one, I think it was an action brought against Captain *Gambier*, who, by order of Admiral *Boscawen*, had pulled down the houses of some suttlers who supplied the navy and sailors with spirituous liquors ; and whether the act was right or wrong, it was certainly done with a

good intention on the part of the admiral, for the health Judgment.
of the sailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the suttler over in his own ship, who would never have got to *England* otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of *Skinner* and the *East India Company* was cited in support of the objection. On the other side, they produced from a manuscript note a case before Lord Chief Justice *Eyre*, where he overruled the objection; and I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of *Nova Scotia*, where there were no regular courts of judicature; but if there had been, Captain *Gambier* might never go there again; and therefore the reason of locality in such an action in *England* did not hold. I quoted a case of an injury of that sort in the *East Indies*, where even in a court of equity Lord *Hardwicke* had directed satisfaction to be made in damages: that case before Lord *Hardwicke* was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain *Gambier*. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous, but I quote it for this reason—a thousand pounds damages, and the costs were a considerable sum. As the captain had acted by the orders of Admiral *Boscawen*, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cause that came on before me: which was the case of Admiral *Palliser*. There the very gist of the action was local: it was for destroying fishing-

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The three other judges concurred.

Per Cur. Judgment affirmed.

It is very curious and instructive to trace the progress of the English law, respecting the locality of actions. During the earliest ages of our judicial history, juries were selected for the very reasons which would now argue their unfitness, *videlicet*, their personal acquaintance with the parties and the merits of the cause ; and few

rules of law were enforced with greater strictness than those which required that the *venue, visne, or vicinetum*, in other words the neighbourhood whence the juries were to be summoned, should be also that in which the cause of action had arisen; in order that the jury who were to determine it principally from their own private knowledge, and who were liable to be *attainted* if they delivered a wrong verdict, might be persons likely to be acquainted with the nature of the transaction which they were called upon to try. *Peregrina judicia*, says a law of Henry the First, *modis omnibus submovemus*. In order to effect this end, the parties litigant were required to state in their pleadings with the utmost certainty, not merely the county, but the very *venue, i.e.*, the very district, *hundred, or vill*, within that county, where the facts that they alleged had taken place, in order that the sheriff might be directed to summon the jury from the proper neighbourhood, in case issue should be taken on any of such allegations. It followed, of course, that a new *venue* was designated as often as the allegations of the parties litigant shifted the scene of the transaction from one part of the country to another. This was, however, soon found to produce great inconveniences; for in mixed transactions, which may happen partly in one place, and partly in another, it was ex-

tremely difficult to ascertain the right *venue*; and as the number of these transactions increased with increasing civilisation, these difficulties about determining the place of trial became of constant occurrence, and soon induced the courts, in order to relieve themselves, to take a distinction between *transitory* matters, such as a contract which might happen anywhere, and *local* ones, such as a trespass to the realty, which could only happen in one particular place; and they established as a rule, that in *transitory* matters the plaintiff should have a right to lay the *venue* where he pleased, and the defendant should be bound to follow it, unless indeed his defence consisted of some matter in its nature *local*, and which must therefore, *ex necessitate rei*, be alleged to have taken place where it really happened. However, this distinction was soon abused by litigious plaintiffs, who, by laying the *venue* in a county distant from the defendant's residence, obliged him to come thither with his witnesses; Gilb. C. P. 89; and this occasioned a return to the ancient strictness with regard to *venues* expressed in the above law of Henry the First. Accordingly by stat. 6 Richard 2, cap. 2, it was enacted that, "to the intent that writs of debt, and account, and all other such actions be from henceforth taken in their counties, and directed to the

sheriffs of the counties where the contracts of the same actions did arise, that if, from henceforth, in pleas upon the same writs it shall be declared that the contract thereof was in another county than is contained in the original writ, that then the said writ shall be utterly abated:" and, as the words of this statute were found not quite sufficient to effect the object, statute 4 Henry the Fourth, c. 18, directed that attorneys should be sworn "that they would make no suit in a foreign county."

After these statutes the judges adopted various means of enforcing their provisions. At first they examined the plaintiff on oath, as to the truth of the *venue*; afterwards they allowed the defendant to traverse it and try it in an issue, *Rastell, Debt*, 184, b. *Fitz. Abr. Brief* 8, and still later they made a rule of court, rendering it highly penal on attorneys to transgress the act of Hen. 4; *R. M.* 1654, pl. 5, K. B.; *M.* 1654, pl. 8, C. P.; but finding that the mode of traversing the *venue* produced great delay, they at last adopted the mode now in use of changing it on motion, which will presently be described more at length.

But all these alterations in the law applied, it must be borne in mind, only to *transitory matters*, for where a matter alleged in pleading was of a *local* description, whether the allegation hap-

pened in a declaration or in any subsequent pleading, the *venue* for the trial of such matter could be nowhere but at the very place where it was alleged in pleading to have happened, and therefore, as is observed in the text, "even in cases the most transitory, if the cause of action was laid in London, and there was a *local* justification as at Oxford, the cause must have been tried in Oxford, not in London." *Acc. Ford v. Brooke*, Cro. Eliz. 261; *Bowyer's Case*, Moore, 410. And it was probably this strictness of the law with regard to *venue* which rendered it necessary to confine the defendant so long to a single plea, since had he pleaded several pleas on which issues had been taken triable by different *venues*, there could have been no single trial of the action; and accordingly we find that it was not till after the effect of the statute of Charles the Second on *venues* had become well settled, that the very same year which put an end to the last remnant of the old severity, by abolishing the necessity of summoning hundreders, also endowed the defendant with a right which he ought in justice always to have possessed, of stating everything in his defence which can by law be made available to exonerate him; the right corresponding to which, that, namely, of replying to the defence everything which has a direct tendency to rebut it, was, even in our more advanced times,

denied the plaintiff, until the passing of the Common Law Procedure Amendment Act, 1852, s. 81.

It may not be inapposite here to observe that the stat. 34 Hen. 8, c. 34, had in comparatively early times created a remarkable anomaly in the then law of *venue*, by rendering certain actions transitory which are unquestionably in their nature *local*. That act, the words of which are set out *ante*, p. 52, gave assignees of the reversion "*the like* advantages" against the lessee, and the lessee the "*like* action and remedy" against the assignee of the reversion, as the lessor and lessee had before that act respectively possessed against each other. Now the remedy of these latter personages against each other was by an action founded upon the contract into which they had reciprocally entered: it was therefore transitory according to the maxim *debitum et contractus sunt nullius loci*, and existed independent of the relation in which they stood to each other in respect of their several interests in the same land: whereas the rights of the assignee of the reversion against the lessee, and of the lessee against the assignee of the reversion, issue entirely out of that relation, and depend on no mutual contract, so that their actions against each other would have been *local*, as those of the assignee of the term against the lessor and his assigns,

and of the lessor and his assigns against the assignee of the term still are, had not the statute intervened, and by the use of the word *like* rendered those actions transitory which otherwise would have been *local*. The result therefore of the statute of Hen. 8, coupled with the common law, is, that the following actions, *viz.*, lessor against lessee, lessee against lessor, assignee of reversion against lessee, lessee against assignee of reversion, are transitory; while the following, *viz.*, lessor against assignee of lessee, assignee of lessee against lessor, assignee of lessee against assignee of lessor, and assignee of lessor against assignee of lessee, are *local*. See *Thursby v. Plant*, 1 Saund. 237; *Stevenson v. Lambard*, 2 East, 575; *Barker v. Damer*, Carth. 182, Salk. 80; *Grogan v. Magan*, 1 Alc. & N. 366.

But to return to the progress of the law of *venue*, stat. 16 & 17 Car. 2, c. 8 (one of the statutes of Jeofails), enacted, "that after judgment no verdict shall be arrested or reversed, for that there is no right *venue*, so as the cause of action were tried by a jury of the proper county or place *where the action was laid*."

Considerable difficulty arose on the construction of this statute, many lawyers contending that the words "the proper county or place where the action is laid," must be understood to mean the proper county or place where the issue

arises, so that if the issue arose at *Dale* in Oxfordshire, and the *venue* was *Sale* in the same county, here they said was a case within the statute, there being a right county but a wrong *venue*. However, it was at length decided in *Craft v. Boite*, 1 Saund. 246, b, contrary to the opinion of Twysden, J., and was settled by many subsequent cases, that the words "*where the action was laid*," mean, where it was laid *in the declaration*, not in any subsequent pleading. And accordingly it has ever since been held that it is sufficient if the jury be summoned from the *venue* laid in the declaration. This *venue* indeed was at that time the *vill* or *hundred* where the cause of action was stated in the declaration to have arisen: and anciently the jury, in order that they might be persons well acquainted with the controversy, were summoned out of the very *hundred* designated for the *venue*. Afterwards the rule was relaxed, and in the reign of Edward the Third, it was sufficient if the jury contained *six* hundreders. Gilb. C. P. c. 8. This number was in Henry the Sixth's reign reduced to *four*; Fortescue de Laud. c. 25; it was afterwards, by stat. 35 Hen. 8, c. 6, restored to *six*; stat. 27 Eliz. c. 6, reduced it to *two*; and so the law remained till long after the stat. 16 & 17 Car. 2, c. 8, after which act it was still necessary that *two* at least of the jurors should be summoned from the *hundred* laid in the declara-

tion; and if there were not so many, it was cause of challenge. But this last remnant of the ancient strictness was abolished by 4 & 5 Anne, c. 6, except so far as concerned actions founded upon penal statutes, to which the abolition was extended by 24 G. 2, c. 18. So that now it is in all cases sufficient if the jury be summoned *de corpore comitatus*, i.e., from the body of the *county* in which the *venue* is laid by the declaration.

It will, however, be remembered that the statute of Charles the Second did not enact positively that the *venue* in the declaration should be adopted, but only prevented the judgment from being arrested or reversed in consequence of its adoption. So that, even now, if a local justification were to be stated in the plea, there seems no reason why the plaintiff should not, if he pleased, carry the cause down to trial to the county mentioned in the plea, as at common law, before the statute of Charles the Second, he *must* have done. Nor does there seem any reason to prevent the defendant from doing so, when he has a right to try the cause by *proviso*; so that a curious question might arise if the plaintiff were to carry the cause down for trial to the county named in the declaration, and the defendant to that laid in his *local* justification. The probability of such a case occurring in practice is, however, extremely remote.

It has been already mentioned

that in transitory actions the judges adopted various modes of enforcing the policy of the statute of Richard the Second, and obliging the plaintiff to lay his *venue* where the transaction in dispute had really occurred. At last, they had recourse to a practice, which seems to have been first introduced in the reign of James the First, per Holt, C. J., 2 Salk. 670; (the first case in the books is *Lord Gerrard v. Floyd*, 1 Sid. 185, E., 16 Car. 2.) founded upon the equity of that enactment, by which they held themselves authorised, upon affidavit made that the cause of action, if any, arose in the county of A., and not in the county of B., in which the *venue* was laid, or elsewhere out of the county of A., to change the *venue* to the county of A., and the motion for so doing was of course, only requiring counsel's signature. R. H. 2 W. 4, pl. 103. But as it would be hard to conclude the plaintiff on the single affidavit of the defendant, it was further held, that the *venue* must be brought back, if the plaintiff undertook to give material evidence in the county in which the action was brought, failing which he must have been non-suited, which was equivalent to an abatement of the writ, according to the statute, Gilb. C. P. 90; *Santler v. Heard*, 2 Bl. 1032, 1033; *Bruckshaw v. Hopkins*, Cowp. 410; *Watkins v. Towers*, 2 T. R. 275. See on the question what evidence satisfied

such an undertaking, *Curtis v. Drinkwater*, 2 B. & Ad. 169; *Collins v. Jenkins*, 4 Bing. N. C. 225; *Greenway v. Titmarch*, 7 M. & W. 221; *Brune v. Thompson*, 2 Q. B. 789; *Clarke v. Dunsford*, 3 Dowl. & L. 618; *Gilling v. Dugan*, 1 C. B. 8; [*Lee v. Simpson*, 3 C. B. 871]. But there were many cases of transitory actions in which the defendant could not by possibility make the above affidavit, in order to procure a change of *venue*. He could not, for instance, do so where the cause of action has arisen partly in one county and partly in another, *Pinkney v. Collins*, 1 T. R. 571; *Clissold v. Clissold*, 1 T. R. 647. So, too, if the action were upon a specialty, because the cause of action follows the instrument, which falls under the class of *bona notabilia* wherever it happens to be, *Foster v. Taylor*, 1 T. R. 781; *Watt v. Daniel*, 1 B. & P. 425; or where a promissory note, [cheque], or bill of exchange, *Smith v. Elkins*, 1 Dowl. 426, [*Webb v. Inwards*, 5 C. B. 483], *Dawson v. Bowman*, 3 Dowl. 161, was the cause of action, the same rule was enforced, seemingly from an idea that those instruments would, like specialties, be *bona notabilia* wherever they chanced to be (see *Mondel v. Steele*, 8 M. & W. 641). It was applied also to the case of a charter-party, *Morrice v. Hurry*, 7 Taunt. 306; or award, *Stanway v. Hislop*, 3 B. & C. 9; *Martin v. Daws*, 11 M. & W. 734; [*Smith v. O'Brien*, 26 L. J. Exch. 30, per

Alderson, B.], specially declared on, the reason for which was said to be, that the written instrument declared on was the cause of action; and that as *contractus est nullius loci*, the cause of action cannot be said to arise more in one county than another: but this principle, which, if universally true, would have prevented the *venue* from being changed on the common rule in any case where the declaration was special on a written instrument, (see *Morrice v. Hurry*, 7 Taunt. 306,) was, however, in some instances departed from, see *Roberts v. Wright*, 1 Tyrw. 532; *Watkins v. Towers*, 2 T. R. 275; *Kirk v. Broad*, Say. 7; *Howarth v. Willett*, 2 Stra. 1180, even prior to the case of *Mondel v. Steele*, 8 M. & W. 641, where the Court of Exchequer, after an elaborate discussion of the subject, held that, at all events, the *venue* might be changed on the common rule in an action upon a contract to be performed in a particular place, and for the breach of which the cause of action arose wholly in one county; and they expressed an opinion that there is no rule against changing the *venue* in actions on written instruments not under seal, other than bills of exchange and promissory notes. That opinion, however, though acted on in *Nash v. Breeze*, Exch., 13th Jan. 1843, 12 L. J. 162, may perhaps be considered as subject to the limitation pointed out by the subsequent decision in *Martin*

v. Daws, 11 M. & W. 734, to cases in which there is no express authority or settled practice to the contrary, as there is in that of an action founded on an award. The general rule laid down in *Mondel v. Steele*, governs all cases not so pre-occupied; and wherever the written contract is not the *cause of action* declared on, it appears to be no objection to changing the *venue*, that probably a written instrument will be given *in evidence* to support the declaration. See *Picard v. Featherstone*, 4 Bing. 39. And even in the other cases above mentioned, in which the court refused to change the *venue* upon the common affidavit, it would do so upon a special one showing that the alteration is for the interests of justice; as, for instance, where all the witnesses are resident in the county into which it is proposed to change the *venue*; or an impartial trial cannot be had in the county in which it is originally laid. See *Tidd's Prac.* 605. And there was this difference between the common and special application to change the *venue*, *viz.*, that the former could not be made in any of the courts after plea pleaded; see *Tidd*, 608; nor in the Exchequer after an order for time to plead "*on the usual terms.*" *Notts v. Curtis*, 2 Tyrwh. 307. Whereas, if the application were on special grounds, it must not have been made till issue joined; or, at least, not till after a plea

clearly showing what would be the nature of the issue has been pleaded, *Dowler v. Collis*, 4. M & W. 531; since it was said the court could not till then know what was the question intended to be tried, and, of course, could form no opinion on the propriety of changing the place of trial, *Tidd*, 614; *Rohrs v. Sessions*, 4 Tyrw. 275; *Cotteril v. Dixon*, 3 Tyrw. 705; *Youde v. Youde*, 4 Dowl. 32. And now, by the rules of Hilary Term, 1853, all former written rules of practice have been abolished, and the only rule substituted relating to *venue* is the 18th, which is, that "No *venue* can be changed without a special order of the court or judge, unless by consent of the parties." It was thought that the effect of that rule was to oblige a defendant applying to change the *venue*, in all cases to produce an affidavit satisfying the judge that there were sufficient substantial grounds for changing the *venue*; but the result of the authorities appears to be, that in cases where the common affidavit would formerly have sufficed, it may still be used as making a *prima facie* case, but subject to be answered by the plaintiff showing grounds for retaining the *venue*; and that where the application is made at a stage at which the common affidavit would not formerly have sufficed, the affidavit upon which the application is founded must be special, as before the new rule, *Ramsden*

v. Skipp, 13 C. B. 601; *Clulee v. Bradley*, *ibid.* 604; *Begg v. Forbes*, *ibid.* 614; *De Rothschild v. Schilston*, 8 Exch. 503; [*Jackson v. Kidd*, 29 L. J. C. P. 220, *per* Willes, J.]; *Smith v. O'Brien*, 26 L. J. Exch. 30. In *Penhallow v. The Mersey Dock, &c., Board*, 29 L. J. Exch. 21, the *venue* was laid in London, but, as appeared by the defendant's affidavits, the cause of action arose in Liverpool, and all the parties and all their witnesses, who were very numerous, resided there. The plaintiff's affidavits in answer showed that an impartial trial could not be had in Liverpool, and the judge being of that opinion was held to have been right in refusing a change of *venue*. The court has an inherent power to change the *venue* from a county in which a fair trial could not be had, *Clerk v. Reg.*, 31 L. J. Q. B. 175, in Dom. Proc.; S. C. 9 H. of L. 184. The practice is now to change the *venue* to the county where the cause can most conveniently be tried, which in general is held to be that in which the witnesses reside, *Smith v. O'Brien*, *supra*. See *Channon v. Parkhouse*, 13 C. B. N. S. 341; *Ross v. Napier*, 30 L. J. Exch. 2. But unless the preponderance of convenience is manifestly in favour of the change of *venue*, the court will not deprive the plaintiff of his right to lay the *venue* where he pleases, *Helliwell v. Hobson*, 3 C. B. N. S. 761; *Durie v. Hop-*

wood, 7 C. B. N. S. 835. Each case in which the common affidavit is answered by the plaintiff must be determined according to its particular circumstances, *Ross v. Napier*, 30 L. J. Exch. 2. The court will not in general interfere with an order to change the *venue* made by a judge in chambers, unless he acted on a misconception of the facts, *Schuster v. Wheelwright*, 8 C. B. N. S. 383; see *Jackson v. Kidd*, 29 L. J. C. P. 221.]

The above rules, however, are only to be taken to refer to transitory actions; for where the *venue* was local the courts did not consider themselves empowered to change it, unless by consent of both parties, or on a suggestion that a fair and impartial trial could not be had in the county where the *venue* was laid. See *Tidd*, 605. But now by 3 & 4 W. 4, c. 42, s. 23, reciting "that unnecessary delay and expense is sometimes occasioned by the trial of *local actions* in the county where the cause of action has arisen," it is enacted, "that in any action depending in any of the said superior courts, the *venue* of which is, by law, local, the court in which such action shall be depending, or a judge of any of the said courts, may, on the application of either party, order the issue to be tried, or a writ of inquiry to be executed, in any other county or place than that in which the *venue* is laid; and for that purpose any

such court or judge may order a suggestion to be entered upon the record, that the trial may be more conveniently had or a writ of inquiry executed in the county or place where the same is ordered to take place." The application under this section must be made *after* issue joined, *Bell v. Harrison*, 4 Dowl. 181. [This act applies to actions brought for offences against penal statutes, *Greenough v. Parker*, Exch., 6 H. & N. 882.] Also by the Common Law Procedure Amendment Act, 1852, s. 41, where two local causes of action are joined, the *venue* may be laid in either county; and by s. 182, in ejectment, "the court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the *venue* is laid, and, such order being suggested on the record, the trial may be had accordingly."

There seems to be no reason why aliens should not sue in England for personal injuries done them by other aliens abroad when such injuries are actionable both by the law of England and also that of the country where they are committed, and the impression which had prevailed to the contrary (see *ante*, 642), seems to be erroneous. [An action brought here will not be stayed on the ground that another action by the plaintiff against the defendant for the same cause is pending abroad,

Cox v. Mitchell, 7 C. B. N. S. 55 ; and see *Pilkington v. Scott*, 31 L. J. Q. B. 81 ; *Scott v. Lord Seymour*, 1 H. & C. 219. *Quære*, whether an assault by one British subject on another in a foreign country, by the law of which damages could not be recovered for it there, is actionable here? *ibid.* It seems not. Actions may be brought in this country against foreigners for injuries committed on the high seas, *The Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759 ; 33 L. J. C. P. 139.]

With respect to transitory causes of action which have accrued abroad, like that in the principal case of *Mostyn v. Fabrigas*, it must be remarked that although the courts of this country will entertain them, still they will, in adjudicating on them, be governed by the laws of the country in which they arose [or in the case of contracts, by the law with reference to which the parties may be presumed to have contracted, *Lloyd v. Guibert*, 35 L. J. Q. B. 74 ; 6 B. & S. 100.] The distinction laid down in all cases of this description is between the cause of action, which is to be judged of with reference to the law of the country where it originated, and the mode of procedure which must be adopted as it happens to exist in the country where the action is brought. Thus in *Trimbey v. Vignier*, 1 Bing. N. C. 151, it was held that as, by the law of *France*, an indorsement in blank does not

transfer any property in a bill of exchange, the holder of a bill drawn in *France* and there indorsed in blank cannot recover upon it in this country against the acceptor. In *Allen v. Kemble*, 6 Moore, P. C. 315, it was held, for similar reasons that the drawer of a bill at Demerara upon Scotland, accepted payable in London, was discharged by the fact of a set-off existing between the holder and the acceptor, which by the Roman Dutch law in force at Demerara, extinguished the debt upon the principle of compensation. [See *McFarlane v. Norris*, 31 L. J. Q. B. 245.] Also, in *Gibbs v. Fremont*, 9 Exch. 25, the holder of a dishonoured bill drawn at Ciudad de los Angeles in California upon Washington, was held entitled as against the drawer to Californian interest. In the case of a bill of exchange, it should seem that acceptance and payment are governed by the *lex loci solutionis*, and the liability of the drawer by the *lex loci contractus*. "The rule," said Tindal, C. J., delivering judgment, in the case of *Trimbey v. Vignier*, *supra*, "which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made: the mode of suing, and the time within which the action must be brought, must

be governed by the law of the country where the action is brought." This distinction was acted on in *The British Linen Company v. Drummond*, 10 B. & C. 903, where it was held that the English statute of limitations was a good plea to an action on a Scotch contract which might in *Scotland* have been put in suit at any time within forty years; in *De la Vega v. Vianna*, 1 B. & Ad. 284, where the defendant was allowed to be arrested for a debt contracted in Portugal, and for which he could not have been arrested there; in *Alivon and another* (provisional syndics of the estate of Beauvain, a bankrupt) v. *Furnival*, 4 Tyrw. 751, where the Court of Exchequer acted on the French law of bankruptcy; and in *Huber v. Steiner*, 2 Bing. N. C. 202, in which the whole difficulty was in ascertaining whether the rule of foreign law applied *ad valorem contractus* or *ad modum actionis instituendæ*. It was an action on a promissory note; and the question was, whether the French law of prescription formed a defence thereto, the action being brought within the English period of limitation. On behalf of the defendant it was contended that laws for the limitation of suits were of two kinds, those which bar the remedy, and those which extinguish the debt; and the following passage was cited from Story's Commentaries on the Conflict of Laws, p. 487:—"Where

the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, in such a case the statute may be set up, in any other country to which the parties remove, by way of extinguishment." "This distinction," said Tindal, C. J., delivering judgment, "when taken with the qualification annexed to it by the author himself, appears to be well founded. That qualification is, 'that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case;' and, with such restriction, it does indeed appear but reasonable, that the part of the *lex loci contractus*, which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded in the foreign country, as the part of the *lex loci contractus*, which gives life to and regulates the construction of the contract; both parts go equally *ad valorem contractus*, both *ad decisionem litis*." However, the court, upon examination of the French law of prescription, thought that its effect was not to extinguish the right, but, as in England, only to bar the remedy, and therefore that the defence was in that case unavailable. [See also *Scott v. Pilkington*, 2 B. & S. 11; *Macfarlane v. Norris*, ib. 783.]

Supposing the law of a foreign country to be, that a contract is, after a certain time, to be deemed absolutely extinguished, it seems not quite reasonable to say that the removal of the parties out of the jurisdiction, while that time is running, should authorise the courts of this country to consider it *in esse* after the period prefixed. The authorities establish, that the law of the country where the contract is made must govern it, and must be looked on as impliedly incorporated with it. Now, if the contract had contained a *proviso* that it should be absolutely void, if not enforced within a certain time, no doubt the English courts would hold it void after the expiration of that time. But what difference can it make that such *proviso* is implied from the law of the country where the contract was made instead of being expressed in terms? Is it not in both cases equally part of the contract? If, indeed, the rule of the foreign law be, that the contract shall, after the lapse of a certain time, become void, provided that the parties to it continue to reside all that time in the same country, the arrival of the period prefixed or its avoidance will depend on the contingency of their abstaining from absenting themselves; and, if they leave the country, never will arrive at all; and this is, perhaps, what Judge Story intends by the words "that the parties are resident within the jurisdic-

tion during all that period, so that it has actually operated upon the case." For if the law be so framed as to operate upon the case without such residence, the qualification appears to be inapplicable.

Another application of the rule that procedure is to be governed by the law of the country in which the action is brought, may be found in the judgment of the Court of Exchequer, in the case of the *General Steam Navigation Company v. Guillon*, 11 M. & W. 877. The action was on the case for running down a ship at sea; one of the defendant's pleas stated that he was a Frenchman, and that the injury complained of was committed on the high seas, out of the jurisdiction of the Queen of England, not by the defendant personally, but by the master of a French vessel in the employ of a French company, of which the defendant was a shareholder and acting director; that the defendant never was possessed of, or interested in, the vessel which did the injury, otherwise than as such shareholder, and that by the law of France he was not responsible for or liable to be sued or impleaded individually, or in his own name or person in any manner whatsoever, but that by that law the company alone, by their style or title, or the master or person in command for the time being of the vessel, was responsible for and liable to be sued or impleaded, and that the

defendant was not the master or person in command. Upon the grammatical construction of that plea, the Court of Exchequer were divided in opinion, but they agreed that if the plea were taken (according to the construction put upon it by Parke, B., and Gurney, B.), to aver that by the law of France the defendant was "not liable for the acts of the master; but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant and not the servant of the individuals composing that body;" there was (as they were all strongly inclined to think) a good defence to the action; but that if, on the other hand, the plea were taken (according to the view of Lord Abinger and Alderson, B.) to mean, "that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders under the name of their association;" then that it was bad on the ground that "the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted, the *lex fori*; and it is no objection to a suit instituted in proper form here, that it would have been instituted in a different form in the court of the country where the cause of action arose, or to which the defendant belongs." So where a

colonial act gave a mode of proceeding against a banking company by suing their chairman, and provided a particular mode of proceeding upon that judgment, against members for the time being, it was considered that the members might, even in respect of a cause of action which arose in the colony, be sued in England either for the original debt or upon the judgment. *Bank of Australasia v. Harding*, [9 C. B. 661]; S. C. 19 L. J. 345; *Bank of Australasia v. Nias*, 16 Q. B. 717; [*Kelsall v. Marshall*, 1 C. B. N. S. 241; *Vanguelin v. Bouard*, 33 L. J. C. P. 79; a plea to an action for an assault that it was committed in a foreign country, where damages are not recoverable in respect of it until certain penal proceedings have been commenced and determined there, goes only to procedure, *Scott v. Lord Seymour*, 1 H. & C. 219.]

In *Lopez v. Burslem*, 4 Moore (Privy Council), 300, the same law was acted upon with reference to the limitation of time prescribed for bringing an appeal after condemnation by a vice-admiralty court under the Slave Trade Abolition Act, 5 G. 4, c. 113. It was contended in that case that the owners of the cargo were not bound by the enactment, being foreigners; but the court, admitting that the British parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the juris-

diction of the British Crown, held that a British statute may fix a time within which application must be made for redress to the tribunals of the empire: "on matter of procedure," they said, "all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the *forum*," and "*if a law were made upon this subject working oppression and injustice to the subjects of a foreign state, that state might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give it effect.*" See further, *Heriz v. Riera*, 11 Sim. 318; *Cooper v. Lord Waldegrave*, 2 Beav. 282; *Beaucé v. Muter*, 5 Moore (Privy Council), 69; *Ferguson v. Fyffe*, 8 Cl. & Fin. 121; *Leslie v. Baillie*, 2 You. & Coll. C. C. 91; [*Cope v. Doherty*, 4 Kay. & J. 367, affirmed 2 De G. & J. 614; *Jago v. Graham*, 32 L. J. Adm. 49; *The Wild Ranger*, 32 L. J. Adm. 49.]

In *Brown v. Thornton*, 6 A. & E. 185, a charter-party was entered into at Batavia. According to the law prevailing there, such instruments are entered in a public book, which is the only evidence of their contents in that colony; a public notary makes two copies from the book, and delivers one to each party, and these are evidence of the original in all Dutch courts except Ba-

tavia. Held, that such copies are not evidence of the original in this country. The courts here will not adopt rules of evidence from foreign courts. *Appleton v. Lord Braybrook*, 2 Stark. 6, 6 M. & S. 34; *Black v. Lord Braybrook*, 2 Stark. 7, 6 M. & S. 39; [see *Abbott v. Abbott*, 29 L. J. Matrim. Cases, 29.] In the case of *Tulloch v. Hartley*, 1 You. & Coll. C. C. 114, the Vice-Chancellor Knight Bruce is supposed to have departed from this rule, on the ground that the property in litigation was *real* property; but his honour does not appear to have intended to lay down any exception to the rule so wide as the alleged ground of his decision might suggest. [The provisions of the 4th section of the Statute of Frauds have been held only to affect the procedure on contracts, therefore a contract made between a British and a French subject in France, and to be performed there, was held to be unenforceable here, because it was not to be performed within a year from the making of it, and was not in writing. *Leroux v. Brown*, 12 C. B. 801. See, however, the judgment in *Williams, App. v. Wheeler*, Resp. 8 C. B. N. S. 316, and in *Gibson v. Holland*, 1 Law Rep. C. P. 8; also the judgment of the Exch. Cha. in *Lloyd v. Guibert*, 1 Law Rep. Q. B. 115. As to whether the *lex loci* may support an action here which by English law would not

be maintainable for want of privity of contract, see *Munroe v. Pilkington*, 31 L. J. Q. B. 81.]

Locus regit actum is a canon of general jurisprudence, and must be assumed in the absence of contrary evidence to hold good in every system of law. *Guepratte v. Young*, 4 De Gex & S. 217. [For recent applications of this maxim, see *Castrique v. Imrie*, 8 C. B. N. S. 1; in error, 405; *Santos v. Illidge*, 6 C. B. N. S. 841; in error, 861; in which case the judgment of the majority of the Court of Error lays down the startling proposition, that if an Englishman contracts with a foreigner abroad to do an act not contrary to the law of the foreign country, but contrary to the law of England, the foreigner may maintain an action in an English court for non-performance. This (with due humility) sounds in supineness, not in comity. See also *Cammell v. Sewell*, 5 H. & N. 728; *Simpson v. Fogo*, 32 L. J. Cha. 249.]

The dictum attributed to Lord Mansfield (in *Mostyn v. Fabrigas*, ante, 637), viz. "The governor is in the nature of a *viceroi*, and therefore locally during his government no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment," was dissented from by the Judicial Committee of the Privy Council in the case of *Hill v. Bigge*, 3 Moore (Privy Council),

465; and Lord Brougham suggested, that the expressions used by Lord Mansfield may have been somewhat altered in the report. In *Hill v. Bigge* to an action of debt brought in a colonial court against the governor, a plea stating his viceregal character was held to afford no defence; but Lord Brougham, adverting to the inconvenience suggested by Lord Mansfield, said in giving the judgment of the court, "It is not at all necessary that in holding a governor liable to be sued we should hold his person liable to arrest while on service; that is while resident in his government. It is not even necessary that we should meet the suggestion of his goods in all circumstances being liable to be taken in execution—though that is liable to a different consideration."

The liability of *sovereign princes* themselves to be sued in the courts of foreign countries underwent a full discussion in the very remarkable case of the *Duke of Brunswick v. The King of Hanover*, 6 Beav. 1, where the defendant was at once a king of one country and a subject of that in which he was sued. Lord Langdale, M.R., in a judgment which exhausts the subject, stated his opinion: 1. That the King of Hanover was "exempt from all liability of being sued in the courts of this country for any acts done by him as King of Hanover, or in his character of sovereign prince;" but that, "being

a subject of the Queen," he was "liable to be sued in the courts of this country in respect of any acts and transactions done by him, or in which he may have been engaged, as such subject." 2. That "in respect of any act done out of this realm, or any act as to which it may be doubtful whether it ought to be attributed to the character of sovereign or to the character of subject, it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject." 3. That in a suit in the Court of Chancery against a sovereign prince who is also a subject, "the bill ought upon the face of it to show that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject." And the decree of the Master of the Rolls, allowing the demurrer in that case to a bill seeking an account against the King of Hanover as guardian of the plaintiff, to which office the king, upon his attaining the throne of Hanover, had been appointed under an arrangement springing out of the deposition of the duke pursuant to a decree of the Germanic Diet in 1830, was affirmed by the House of Lords on appeal (2 House of Lords Cases, 1), on the ground that a sovereign is not liable to be sued in respect of matters of state. In the case of *The Nabob of Arcot v. East India Company*, 3 Br. C. C. 291, 4 Br. C. C. 180, 2 Ves. J. 56, see Beames,

El. Pl. 73, the Court of Chancery refused to entertain a suit arising out of transactions of state between sovereign powers, though the defendants were subjects of this country. And in *Wadsworth v. The Queen of Spain*, 17 Q. B. 171, and *De Haber v. The Queen of Portugal*, 17 Q. B. 196, proceedings in foreign attachment instituted against property belonging to those sovereigns in their public capacity by the holders of Spanish and Portuguese bonds were stayed by prohibition. In *Munden v. The Duke of Brunswick*, 10 Q. B. 656, it was considered to be no plea to an action on an annuity deed, that the defendant was a sovereign prince at the time it was made, without showing either that it was an act of state, or that the defendant retained his sovereign character at the time of action brought. [So in the case of a suit by a foreign sovereign in amity with us, although the foreign sovereign is entitled to *sue* in our courts for wrongs done to him by English subjects, without authority from the English government, in respect of property belonging to him either in his individual or his corporate capacity, yet he cannot maintain a suit here for invasions of his prerogative as reigning sovereign. See the judgments and the cases collected in *The Emperor of Austria v. Day*, 30 L. J. Cha. 690: *The King of Portugal v. Russell*, 31 L. J. Cha. 228; *Glad-*

stone v. The Ottoman Bank, 32 L. J. Cha. 228.]

Upon the same principle which exempts sovereigns from liability to be sued in respect of acts of state, seems to rest the immunity of a soldier against actions by foreigners for acts done by him in a hostile manner, in the name of the government which he serves, provided those acts be either authorised by an actual command, or ratified by a subsequent approval of the government: to such acts the maxim *respondeat superior* seems to apply in its widest sense; and for any injury inflicted by them, (if redress be denied by the government,) there is no remedy but an appeal to arms. See Vin. Abr. Prærogative (L. a.): *Elphinstone v. Bedreechund*, 1 Knapp (Privy Council), 316; *Dobree v. Napier*, 2 N. C. 781; *Buron v. Denman*, 2 Exch. 167; *Paradine v. Jane*, Style R. 48; [*Reg. v. Lesley*, 1 Bell. C. C. 220; S. C. 8 Cox, C. C. 269; 29 L. J. Exch. 877; *The Secretary of State, &c., of India v. Kamachee Boye Sahaba*, 13 Moore, P. C. 22. On a question whether a government officer was liable to the plaintiffs (who were Indian subjects of her Majesty) for an act done by him in his official capacity, the lords of the Privy Council laid down, that "if the act which he did was in fact wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer,

whether the act was his own spontaneous act and unauthorised, or whether it was done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the government is morally bound to indemnify its agent, and it is hard on such agent if this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration." *Rogers v. Rajendro Dutt*, 13 Moore, P. C. 236; see *per cur.* *Feather v. Reg.*, 35 L. J. Q. B. 200, 209; S. C. 16 C. B. N. S. 310; *Tobin v. Reg.*, 33 L. J. C. P. 199. As to the liability *inter se* of persons joining in a hostile expedition for acts done in obedience to the lawful orders of government officers sent out in command of the expedition, see *Hodgkinson v. Fernie*, 2 C. B. N. S. 415.] As to an action for acts done abroad by a commanding officer in his official capacity, as reducing a non-commissioned officer to the ranks, &c., see *Barwis v. Keppel*, 2 Wils. 314.

Whether an ambassador is entitled to absolute exemption from suit in the courts of the country to which he is sent, or only to be protected from process which may directly affect his person or property, was discussed in the case of *Taylor v. Drouet*, 14 C. B. 487,

where it was considered unnecessary to decide the question, the court being of opinion that such a privilege, if it existed, was at all events waived by the defendant's having voluntarily appeared to the writ, and not raised any objection until a late stage of the proceedings. *Quære*, whether in that case too much stress was not laid upon the opinion of Bynkershoek as to proceedings *in rem* in the case of princes and ambassadors; see *Wadsworth v. The Queen of Spain*, 17 Q. B. 171, *per curiam*. [The question has since been resolved in favour of the ambassador, on the principle "*omnis coactio a*

legato abesse debet." *The Magdalena Steam Navigation Co. v. Martin*, 2 El. & El., 28 L. J. Q. B. 310; *Gladstone v. Musurus Bey*, 32 L. J. Cha. 155; *The Secretary of State for India v. Kamachee Boye Sahaba*, 13 Moore, Pr. C. 22.]

As to the liability of judges for judicial acts, see further, *Calder v. Halkett*, 3 Moore (Privy Council), 28; *Graham v. Lafitte*, Ibid. 382; *Houlden v. Smith*, 14 Q. B. 841; [*Gelen v. Hall*, 2 H. & N. 379; and *Barnardistone v. Soame*, 6 Howell, State Trials, 1095; *Kemp v. Neville*, 10 C. B. N. S. 549; 31 L. J. C. P. 158.]

CREPPS v. DURDEN ET ALIOS.

TRINITY,—17 GEO. 3, B. R.

[REPORTED COWP. 640.]

A person can commit but one offence on the same day, by "exercising his ordinary calling on a Sunday," contrary to the statute 29 Car. 2, c. 7.

And if a justice of peace proceed to convict him in more than one penalty for the same day, it is an excess of jurisdiction for which an action will lie, before the convictions are quashed (secus now, as to the last point, by the 11 & 12 Vict. c. 44, s. 2).

See an analogous case, *Brooks and another v. Glencross*, 2 M. & Rob. 62; and see *R. v. Eastern Counties Railway*, 10 M. & W. 58. As to the effect of two orders or convictions for the same offence, see *Wilkins v. Hemsworth*, 7 A. & E. 807; *Wilkins v. Wright*, 3 Tyrw. 830, 2 C. & M. 193. ["The form which the legislature uniformly adopts, when the intention is that for each and every violation of an act of parliament, there shall be a distinct penalty, is to impose a penalty by express words for each and every offence," Pollock, C.B.]

THIS was an action of trespass brought by the plaintiff against the defendant, for breaking into his house and taking away his goods, and converting them to his own use; to this the general issue was pleaded, and the cause came on to be tried at Westminster, before Lord Mansfield, at the sittings after Easter term, 1777; when a verdict was found for the plaintiff, for three several sums of five shillings each, and costs 40s., subject to the opinion of the court upon the following case—"That the plaintiff was convicted of selling small hot loaves of bread, the same not being any work of charity, on the same day (being Sunday) by four separate convictions, which were as follows: 'Westminster to wit. Be it remembered, that on the 10th of November, 1776, Peter Crepps, of &c., baker and salter of bread, is lawfully convicted before me, Jonathan Durden, one of his Majesty's justices of the peace for the said city and liberty of Westminster, for unlawfully doing and exercising certain worldly

labour, business, and work of his ordinary calling of a baker in the parish aforesaid, by selling of small hot loaves of bread, commonly called rolls, the same not being any work of necessity or charity, on the said 10th of November, being the Lord's day, commonly called Sunday, contrary to the statute in that case made and provided; for which offence I, the said Jonathan Durden, have adjudged, and do hereby adjudge, the said Peter Crepps to have forfeited the sum of five shillings.' "

The three other convictions were *verbatim* the same, without any variation. The case then proceeded to state, that the defendant Durden issued the four warrants, afterwards stated, to the other defendants, who by virtue of those warrants levied the four penalties of five shillings each, and the expenses. The first of these four warrants ran thus:—"Westminster *to wit*. To the constables of St. James's, in the city and liberty of Westminster. Whereas information has been made before me, Jonathan Durden, one of his Majesty's justices of the peace for the city and liberty of Westminster, that Peter Crepps, baker, of &c., did on the 10th day of November, 1776, being the Lord's day, commonly called Sunday, exercise his trade and ordinary calling of a baker, by selling hot loaves of bread, contrary to the statute in that case made and provided; and whereas the said Peter Crepps has been duly summoned to appear before me, to answer to the said information, but has contemptuously refused to appear to answer the contents thereof; and whereas, upon full examination, and upon the oath of J. H., the said Peter Crepps was lawfully convicted before me of the offence aforesaid, whereby he has incurred the penalty of five shillings, pursuant to the statute in that case made and provided; therefore," &c. &c. The words of the other three warrants were *verbatim* the same.

The first question reserved was, whether in this action, and before the convictions were quashed, an objection could be made to their legality? If no objection could be made, then a nonsuit was to be entered. But in case an objection to their legality might be made, then the

4.-G. v. McLean, 1 H. & C. 750. One conviction for several curses on same day with a cumulative penalty at the rate of so much per curse held good, *R. v. Scott*, 33 L. J. M. C. 15. Several convictions for selling pieces of bad meat at same stall on same day held good, in *re Hartley*, 31 L. J. M. C. 232.]

question was, whether the levy under the three last warrants could be justified? If not justifiable, a verdict was to be entered for the plaintiff, with 15s. damages and 40s. costs; if justifiable, then a verdict was to be entered for the defendants.

Argument for
the plaintiff.
First point.

Mr. *Buller* for the plaintiff, as to the first point, insisted, that wherever a conviction is in itself clearly bad, it is open to the party to take objection to it in an action against the justice; and it is no answer on his part to say, that the conviction is not quashed, or in force; because it is incumbent upon him to show the regularity of his own proceedings. That there were several cases to this purpose; and though they were decisions at *Nisi Prius*, yet, as they were uniform in laying down the same doctrine, they ought to have considerable weight in this case. The first he should mention was *Hill v. Bateman*, 1 Str. 711; not for the principal matter adjudged, but because it was agreed on all hands, in that case, as a settled point, "that in all actions against justices of peace, they must show the regularity of their proceedings." He added, that he had a manuscript note of the same case, to the same purport. In a case of *Moult v. Jennings, coram Eyre*, C. J., upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared that the plaintiff had been convicted of swearing; and *Eyre* said, if the nature of the oaths had not been specified in the conviction, so that they might appear to the court, the conviction would have been void. In *Stanbury v. Bolt, coram Fortesque*, J., Trin. 11 G. 1, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plaintiff had been summoned; and the conviction was adjudged void for that reason only. In *Coles's Case*, Sir William Jones, 170, it was held by the whole court, "that if a justice does not pursue the form prescribed by the statute, the party need not bring error, but all is void, and *coram non judice*." There are other authorities in which it has been held, that an action will lie, even though the conviction is good in point of form, if it is not supported by the truth and justice of the case.

There was one in *Shropshire*, before *Gould*, J., where the plaintiff had been convicted upon the game laws, and the conviction itself was good in point of form : but the party was not, in truth, an object of the game laws ; whereupon *Gould* directed the jury to find for the plaintiff, which they accordingly did. There was another case in *Lancashire*, before Mr. Justice *Gould*, to the same effect. In criminal cases it is clear, that the conviction being good in point of form is no protection to the justice ; and, if not, why should it be so in a civil action ? If he convict illegally, he ought not to be sheltered, and an action is the only mode of redress to the party injured. But, if the formality of the conviction is to be an answer to the action, the party injured would be without redress, where he would be most entitled to it ; because the caution of the justice, to be correct in form, would increase in proportion to his intention to act illegally. In *Brucklesbury v. Smith*, 2 Burr. 656, every act previous to the conviction is set out, as well as the conviction itself. If this case had happened before the stat. 7 Jac. 1, c. 5, which enables justices of peace to plead the general issue, and give the special matter in evidence, the defendant must have specially set forth every stage of the proceedings upon the record, and the omission of any one fact would have been fatal : or, if upon the face of the record it had appeared the conviction was illegal, it would have been a good cause of demurrer. Since the statute, his defence must be equally good in evidence : for the statute does not vary the law ; it only meant to ease the justice from the difficulty and risk of special pleading. Even in cases where the legislature gives a summary form of conviction, and where no summons is necessary, the justices must pursue the form prescribed, or it will be fatal. Secondly, upon the merits : the words of the stat. 29 Car. 2, c. 7, are, “that no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord’s day, works of necessity and charity only excepted.” In *Rex v. Cox*, 2 Burr. 786, the Court held, “that baking puddings and pies was within the

Argument.

Second point.

Argument. exception ;" and, if so, why should not the baking rolls be so too? But what is decisive is, that the stat. 29 Car. 2, c. 7, gives no summary form of conviction ; whereas the convictions produced barely state that the plaintiff was convicted, without any information, summons, appearance, or evidence being stated. In point of form, therefore, all

Third point. four are bad. Lastly, supposing they were good in form, the three last are an excess of the justice's jurisdiction ; for the offence created by the statute is "exercising his calling on the Lord's day." If the plaintiff, therefore, had continued baking from morning till night, it would still be but one offence. Here there are four convictions for one and the same offence ; consequently, as to three, there is an excess of jurisdiction ; and if so, all is void, and *coram non judice* : and an action will lie, not only against the justice, but likewise against the officers. To this point he cited Hardres, 484, and concluded by praying judgment for the plaintiff.

Argument for
the defendant.
First point.

Mr. T. Cowper, *contra*, for the defendant, contended,

1. That by the bare production of the conviction at the trial the cause was at an end, and the Court estopped from any further inquiry. That it was the general apprehension and prevailing opinion of the profession, founded in constant practice, that a conviction in a matter of which the justice had jurisdiction, must be removed by *certiorari* and quashed, before it can be questioned at *Nisi Prius*. If he has no jurisdiction, no doubt but all is *coram non judice*, and void. But here the justice had jurisdiction ; and if so, with deference to the opinion of Mr. Justice Gould, in the cause tried before him in *Shropshire*, the conviction, as to the matter of fact contained in it, is conclusive in favour of the justice in an action, though it is not so in an information. If it were not, instead of the mischief to be apprehended from the oppression of the justice, no one would act in the commission.

2. As to the objections which have been taken to the convictions in point of form, he said, it would be time enough to answer them when the convictions were removed and stood in the paper for argument. At present

Second point.

it was sufficient to observe that they continued as so many judgments on record, and, as such, conclusive, till reversed by appeal, or quashed by this court. He agreed the stat. 7 Jac. 1, c. 5, did not vary the law: but insisted, that before that statute, it would have been a good plea for the defendant to have stated, that the plaintiff was convicted, &c., as in this case; and if the plaintiff had traversed the conviction, the defendant might have demurred. The sole ground and object of taking away the *certiorari* in the several acts of parliament for that purpose, was to prevent vexatious suits against justices for mere informalities in their proceedings. But they still remain liable to an information if they wilfully act wrong. This Court has often lamented, when obliged to quash a conviction for want of form, because it opens a door to an action.

As to this being but one continued offence, it might be, that it was carried on at four different places; for there is evidence of four different acts, and the Court will not presume the contrary against the justice. But, if the nature of the offence is such, that it could only be committed once in the same day, still the plaintiff has no remedy, while the convictions are in force, but by removing them into this court to be quashed for illegality.

Lord *Mansfield*.—May there not be this point, that the justice had no jurisdiction, after convicting the plaintiff in the first penalty? The act of parliament gives authority to punish a man for exercising his ordinary calling on Sunday. The justice exercises his jurisdiction, by convicting him in the penalty for so doing. But then, he has proceeded to convict him for three other offences in the same day.

Mr. *Cowper*.—If he has done so, it is only a ground for quashing the convictions: but no priority appears to give legality to one in preference to the other.

Lord *Mansfield*.—This point you agree in; that if the justice had no jurisdiction, it is open to inquiry in an action. Now, if there are four convictions, for one and the same offence committed on one and the same day, three

Argument.

of them must necessarily be bad; and, if so, it does not signify as to the merits of the action which of the four is legal, or which illegal.

I do not remember that at the trial it was contended the plaintiff would be entitled to recover if the convictions were informal: or that any objection was taken to their formality there. The single question intended to be tried was, whether there could be more than one penalty incurred for exercising a man's ordinary calling on one and the same Sunday? As to that there can be no doubt: the only doubt was, whether that objection could be taken at the trial *before the convictions were quashed*. In the extent in which the argument upon that point has proceeded, it is a matter of considerable consequence; and, as a general question, I should be glad to think of it.

Aston, J.—The Court will never grant an information unless the conviction is quashed. *Rex v. Heber*, 2 Str. 915. As to the general question before the Court, suppose the justice were to convict for a single offence, where no offence at all had been committed, would not an action lie in that case? If it would, why not in this, where there are four convictions for one and the same offence? It seems to me that the baking every roll might as well have been charged as a separate offence.

Cur. adv. vult.

Judgment.

Afterwards, on Wednesday, June 18th in this term, Lord *Mansfield*, after stating the case at large, delivered the unanimous opinion of the Court as follows:—Upon the trial of this cause, no objection was made to the formality of the convictions: I doubt whether they were read, and for this reason; because, by the state I have of them, they appear different from the warrants; for the convictions take no notice of any summons,* nor of any informations, nor of any evidence† upon oath given; though the warrants take notice of a summons, of the defendant's not appearing to that summons, of an information laid, and evidence given upon oath. This objection

* Nor that the defendant made default. See *R. v. Allington*, 2 Str. 678; *R. v. Venables*, 1b. 630; *R. v. Stone*, 1 East, 649.

† See *R. v. Lovett*, 7 T. R. 152; *R. v. Theed*, 2 Str. 919; *R. v. Smith*, 8 T. R. 588.

would have gone to all the four cases equally, but at the Judgment, trial no objection whatever was made to the first conviction or warrant. But the objection made was this; that, allowing the first conviction and warrant to be good, the three others were an excess of the jurisdiction of the justice, and beyond it; for that on the true construction of the stat. 29 Car. 2, c. 7, there can be but one offence, attended with one single penalty, on the same day.

In answer to this it was objected, on the part of the defendants, that no such objection could be taken to the convictions till after they had been quashed in this court; and that if a case were to be made with regard to that, it must be taken upon the question, whether, according to the true construction and meaning of the act, the party could be guilty of repeated offences on one and the same day? Therefore, the questions stated for the opinion of the court on the present case are, first, "whether, in this action, and before the convictions were quashed, an objection could be made to their legality? If the court should be of opinion no objection could be made, then a nonsuit to be entered up; but in case the objection might be made, then, 2ndly: whether the levy made under the three last warrants could be justified?" The first question is, "whether any objection can be made to the legality of the convictions before they were quashed." In order to see whether it can, we will state the objection: it is this; that here are three convictions of a baker, for exercising his trade on one and the same day; he having been before convicted for exercising his ordinary calling on that identical day. If the act of parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the act of parliament, the offence is, "exercising his ordinary trade upon the Lord's day;" and that, without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one, or a number of particular acts. The penalty incurred by this offence is five shillings. There is no idea conveyed by the

Judgment.

act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence, on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day: killing a single hare is an offence; but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here, repeated offences are not the object which the legislature had in view in making the statute: but singly to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had *no jurisdiction whatever* in respect of the three last convictions. How then can there be a doubt, but that the plaintiff might take this objection at the trial? 2ndly. With regard to the form of the defence, though the stat. 7 Jac. 1, c. 5, enables justices of peace to plead the general issue, and give the special matter in evidence; in doing so, it only allows them to give that in evidence, which they must before have pleaded; and, therefore, they must still justify. But what could the justification have been in this case, if any had been attempted to be set up? It could only have been this: that, because the plaintiff had been convicted of one offence on that day, therefore the justice had convicted him in three other offences for the same act. By law that is no justification: *it is illegal on the face of it*; and, therefore, as was very rightly admitted by the counsel for the defendant in the argument, if put upon the record by way of plea, would have been bad, and on demurrer must have been so adjudged. Most clearly then, it was open to the plaintiff upon the general issue, to take advantage of it at the trial. The question does not turn upon niceties; upon a computation how many hours distant the several bakings happened; or upon the fact of which conviction was prior in point of time; or that for uncertainty in that respect, they should all four be held bad: but it goes

upon the ground, that the offence itself can be committed. Judgment. only once in the same day. We are, therefore, all clearly of opinion, that if there was no jurisdiction in the justice, the same might have appeared at the trial: of course, we are of opinion that this objection might have been made, and that the objection itself, in point of law, is well founded.

Per Cur. *Postea* to be delivered to the plaintiff.

[SUBJECT to the act for the protection of justices, 11 & 12 Vict., c. 44, a summary of which will presently be given,] the rule is the same—whether the conviction appear on the face of it to be for an offence not within the magistrate's jurisdiction—or to be for an offence within the magistrate's jurisdiction, but defective for want of the circumstances necessary to a conviction for that offence, *Griffiths v. Harries*, 2 M. & W. 335; see *Lancaster v. Greaves*, 9 B. & C. 628; *Morgan v. Hughes*, 2 T. R. 225; *Fearnley v. Worthington*, 1 M. & G. 491; *Hardy v. Ryle*, 9 B. & C. 603; *Groome v. Forrester*, 5 M. & S. 320;—or of a sufficiently specific statement of them, *Newman v. Earl of Hardwicke*, 8 A. & E. 127; *R. v. Read*, 9 A. & E. 619; for, as was observed in *Lancaster v. Greaves*, though the conviction is conclusive upon matter of fact, and, if the defendant mean to rely on matter of fact, he should make his defence at the time, the rule is not so as to matter of law. So if

the conviction of two persons be joint for offences *ex necessitate rei* several, it will be void, and (subject now to the act above-mentioned) they may sue in trespass if it be acted upon, *Morgan v. Brown*, 4 A. & E. 515. And the rule is the same in the case of a single conviction of one person for two distinct offences, *Newman v. Bendyshe*, 10 A. & E. 11.

But “a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, *conclusive evidence* of the facts stated in it,” *Brittain v. Kinnaird*, 1 B. & B. 482; *per* Dallas, C. J. In that case trespass was brought against justices for taking a boat; in their defence they relied on a conviction which warranted them in doing so. The plaintiff offered evidence to controvert the facts stated in the conviction, but it was held not to be admissible. *Accord.* *Basten v. Carew*, 3 B. & C. 649; *Farwett v. Fowles*, 7 B. & C. 394; *Gray v. Cookson*, 16 East, 13; *Lowther v. Earl Rudnor*, 8 East, 113; *Ash-*

croft v. Bourne, 3 B. & Ad. 684; *R. v. Bolton*, 1 Q. B. 66; and the same attribute, *viz.*, that of being conclusive evidence of the facts stated therein, and properly tending thereto, seems to have been thought to belong to every adjudication emanating from a competent tribunal, *Aldridge v. Haines*, 2 B. & Ad. 395; and the cases cited by Coleridge *arguendo*; [see also the *Whitbury-on-Severn Union Case*, 4 E. & B. 321; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; *Kemp v. Neville*, 10 C. B. N. S. 549; 31 L. J. C. P. 163, S. C.; *Ex parte Lamert*, 33 L. J. Q. B. 69.]

Even when the conviction had been quashed it was provided by the 43 G. 3, c. 141, that the party convicted, in an action against the justices, which was required to be on the case, should only obtain two pence damages, besides the amount of the penalty if levied, and no costs of suit, unless he expressly averred malice and want of probable cause; and that he should not recover the amount of the penalty if the defendant proved him to have been guilty of the offence of which he had been convicted, and that he had undergone no greater punishment than was by law assigned thereto. And it was held under this act that he must at the trial prove not merely his own innocence of the offence of which he was convicted, but also what took place before the justice at the time of conviction, in order that it may appear whether there

was probable cause or no, *Burley v. Bethune*, 5 Taunt. 580. See *Baylis v. Strickland*, 1 M. & Gr. 591.

But the stat. 43 Geo. 3, c. 141, is now repealed by the 11 & 12 Vict. c. 44, intituled, "An act to protect justices of the peace from vexatious actions for acts done by them in the execution of their office," the first section of which provides that *every action* to be brought against any justice after the 2nd of October, 1848, for any act done by him in the execution of his duty as such justice, as to any matter *within his jurisdiction*, [see *Sommerville v. Mirehouse*, 1 B. & S. 652; *Lawrenson v. Hill*, 10 Irish C. L. R. 177; *Gelen v. Hall*, 2 H. & N. 379,] shall be *on the case*, and the declaration shall allege the act to have been done maliciously and without reasonable and probable cause, and if such allegation be not proved upon the plea of the general issue, the plaintiff shall be nonsuit, or a verdict shall be given for the defendant. See *Kendall v. Wilkinson*, [4 E. & B. 680; S. C.] 24 L. J. M. C. 89; [*Semble*, in cases within this section, the action may be maintained without the conviction or order being quashed, *per* Lord Campbell, C. J., *R. v. Wood*, 5 E. & B. 58; and see *Lawrenson v. Hill*, *suprà*.] But when the act is done by the justice in a matter of which he has *no jurisdiction*, [as in *Crepps v. Durdén*] or where he *exceeds his jurisdiction*

tion, he may, by sect. 2, be sued as before the statute, except where the act complained of has been done under a conviction or order, in which case "the conviction" (*sic* in statute) must be first quashed—or if done under a warrant for appearance followed by a conviction or order, the conviction or order must be first quashed—but if not followed by conviction or order, and granted after information for an indictable offence, or after service of summons and non-attendance, no action can be maintained. See, as to the construction of this section, *Leary v. Patrick*, 15 Q. B. 266; *Newbould v. Coltman*, 6 Exch. 189; *Haylock v. Sparke*, 1 E. & B. 471; [*Pease v. Chaytor*, on demurrer, 1 B. & S. 658; 31 L. J. M. C. 1; on motion, 3 B. & S. 620; *Pedley v. Davies*, 10 C. B. N. S. 492; 30 L. J. C. P. 374; *Bessell v. Wilson*, 1 E. & B. 489; *Lawrenson v. Hill*, 10 Ir. C. L. R. 177; *Lalor v. Bland*, 8 Ir. C. L. R. 115, and *Bott v. Acroyd*, Q. B. 28 L. J. M. C. 207, where the objection to a conviction and warrant of commitment was that the justices had signed it leaving blanks for the amount of costs, but this omission was held, in an action for false imprisonment against the justices brought after the conviction had been quashed, to be an erroneous exercise of jurisdiction only, and not an excess]. The summons mentioned in the statute, the non-attendance upon which is to bar the maintenance of an action, is a summons *before* conviction; the section does not apply to a summons and warrant issued after conviction, with a view to the levying of the penalty imposed, *Bessell v. Wilson*, 1 E. & B. 489. In *Barton v. Bricknell*, 13 Q. B. 393, an action of trespass was brought against a justice for wrongfully seizing the plaintiff's goods. It appeared that the defendant had convicted the plaintiff under the 29 Car. 2, c. 7 (for Sunday trading), in a penalty and costs to be levied by distress. The conviction directed that in case of non-payment, and if there should be no distress, the plaintiff should be put in the stocks for two hours, unless the penalty and costs were sooner paid. The goods of the plaintiff were distrained, and the conviction was *quashed* on account of the illegal alternative contained in it, as to the stocks. It was held that the defendant was protected under sect. 1 of this statute, and that sect. 2 did not apply, as the *defendant had jurisdiction to order the distress*, in respect of which alone the action was brought.

Sect. 3 protects a justice *bonâ fide* granting a warrant upon the conviction of another justice, which is defective for want of jurisdiction, and makes the convicting justice alone liable.

Sect. 4 prohibits actions by parties rated to the poor, though not liable to be rated, or in respect of any defect in such rate

against the justices issuing a distress warrant thereon,—and further provides that the exercise of discretionary powers vested in a justice by statute, shall not furnish ground of action.

By sect 5 [if a justice refuses to do any act relating to the duties of his office], the Court of Queen's Bench [may order him to do the act, and he will not be] liable to [any proceeding for having obeyed the order]. The court acts upon this section where justices refuse to determine a case over which they have jurisdiction, [and a mandamus to them to hear and determine the case would issue, *R. v. Cotton*, 15 Q. B. 569; *R. v. Justices of Bristol*, 18 Jur. 426, *in notâ*; S. C. 3 E. & B. 479, *in notâ*; *R. v. Paynter*, 7 E. & B. 328; *R. v. Dayman*, *ib.*, 672; *R. v. Dunn*, 7 E. & B. 220; but not where the refusal is merely formal, and made for the purpose of eliciting the opinion of the court, and deciding the case according to the opinion given, *R. v. Paynter*; *R. v. Dayman*. It is sometimes a nice question whether the justices have declined jurisdiction, or whether they have adjudicated, *R. v. Brown*, 7 E. & B. 757; *R. v. Paynter*; *R. v. Dayman*; *R. v. The Mayor, &c., of Rochester*, 7 E. & B. 910; *R. v. Wood*, 5 E. & B. 49; and *R. v. Padwick*, 8 E. & B. 704, in which case the dismissal by quarter sessions of an appeal for want of jurisdiction was held to be a

decision within the meaning of 12 & 13 Vict. c. 45, s. 5. See also *Carr v. Stringer*, E. B. & E., where, though an appeal did not lie, yet the court entertained the question so far as to examine whether they had jurisdiction, and to give costs to the respondent: and see *Ex parte Monroe*, 8 E. & B. 822]. But the court refused to make an order, directing justices to issue a warrant of distress, where the liability of the person against whom it was sought appeared seriously doubtful, *R. v. Browne*, 13 Q. B. 654. [Orders to issue warrants of distress were made in *R. v. Justices of Kingston-upon-Thames*, E. B. & E. 256; *R. v. Bradshaw*, 29 L. J. M. C. 176; *R. v. Eastern Counties Rail. Co.*, 5 E. & B. 974; *R. v. Lindford*, 7 E. & B. 950; *R. v. Boteler*, 33 L. J. M. C. 101; *R. v. Higginson*, 31 L. J. M. C. 189; *In re Hartley*, 31 L. J. M. C. 232;—to sign an order for the preferment of an indictment in *R. v. Arnold*, 8 E. & B. 550.] On a motion against a magistrate under this section, the general rule is, that the court will order the unsuccessful party to pay costs, and will not, on the motion for costs, enter into the merits of the original application, *R. v. Ingham*, 17 Q. B. 884.

Sect. 6 makes the confirmation of a conviction or order on appeal a protection to a justice who issues a warrant upon it either before or after such confirmation.

Sect. 7 empowers a judge to set aside the proceedings in any action brought against a justice contrary to the provisions of the act: and every action against justices must be brought within six months after the act complained of (sect. 8), and not until after a month's notice in writing, &c. (sect. 9). [The notice must be given, although the cause falls within the first section of the act, *Kirby v. Simpson*, 10 Exch. 338. In cases within that section the notice should show that the act charged was malicious, *Taylor v. Nesfield*, 3 E. & B. 724. It may be given before the quashing of the order, the act complained of being the cause of action, although the action itself cannot be brought until after the quashing, *Haylock v. Sparke*, 1 E. & B. 471. Sect. 10 makes the venue in the action local, and gives the defendant an option to plead the general issue, and under it prove the special facts, and also gives him the privilege of exemption from the jurisdiction of the county court. [See *Weston v. Sneyd*, 1 H. & N. 703.] By sect. 11 a recovery of less than the amount tendered or paid into court gives him a verdict with the security of the sum paid into court for his costs; and by sect. 12 the verdict is to be against the plaintiff, or he is to be nonsuited, if he has not complied with the above-mentioned preliminaries. Sect. 13 provides that the plaintiff shall

not in any case recover more than two pence damages where it appears that he was guilty of the offence of which he was convicted, or liable by law to pay the sum ordered to be paid, and that he has undergone no greater punishment than that assigned by law to the offence of which he was convicted, or for non-payment of the money ordered to be paid. By sect. 14 the plaintiff is to have costs, as before the act, and where the act complained of is stated to have been done maliciously, &c., they are to be taxed as between attorney and client, and in all cases where there is judgment against him he is to pay costs as between attorney and client.

Such is a summary of the provisions of this important statute.

The conviction [or order] may be drawn up at any time before it is returned to the quarter-sessions [see the 11 & 12 Vict. c. 43, s. 14,] so that though it may be informal at first, the magistrate has an opportunity of amending it; and it has been declared to be not only legal but laudable so to do, *R. v. Bealer*, 1 East, 186. Unless, indeed, it have been quashed or its invalidity otherwise ascertained by the decision of a superior court, as for instance, by the Queen's Bench on Habeas Corpus, *Chaney v. Payne*, 1 Q. B. 725. But it would seem that after an invalid conviction has been filed at sessions, another might be substituted, *R. v. Richards*, 5 Q. B.

926. But the rule is different in case of an order, *R. v. Justices of Cheshire*, 5 B. & A. 439. [And see as to the amendment of orders made by justices, 12 & 13 Vict. c. 45, s. 7; *R. v. Higham*, 7 E. & B. 557; *R. v. Lundie*, 31 L. J. M. C. 157.]

In *Griffith v. Harries*, 2 M. & W. 335, it was stated by Baron Parke, that in a case of *Dimsdale v. Clarke*, A.D. 1829, he and Mr. J. Littledale differed from Mr. J. Bayley on the question whether it be necessary that the magistrate's jurisdiction should appear *affirmatively* on the conviction, Mr. J. Bayley thinking that it need not; but see *Day v. King*, 5 A. & E. 359; *R. v. Lewis*, 8 A. & E. 885.

As the law regarding *summary convictions* before justices is of great and daily increasing importance, on account of the immense variety of subjects which fall within this sort of jurisdiction, it seems advisable to [make some general remarks on it].

A conviction before a justice or justices of the peace without the intervention of a jury is always under some statute; the common law knows of no such proceeding. It [has been] regarded by the courts with no particular favour, and [formerly the justice was obliged], on the record of it, to show [in detail] that he had proceeded *recto ordine*. So much precision was required in drawing it up, that magistrates and their clerks were under considerable

difficulty, and ran considerable risk in framing it. For their ease and protection stat. 3 Geo. 4, c. 23, provided a general form [which, however, was only applicable where no particular form had been given, and required the evidence to be set forth. This statute has been repealed, and nearly all difficulty in framing a conviction removed, by one of the three Jervis's acts relating to justices acting out of quarter sessions (the third of which, 11 & 12 Vict. c. 44, has been above epitomised), namely by the Summary Convictions and Orders Act, 11 & 12 Vict. c. 43, which gives short forms of convictions and of proceedings to obtain and enforce them], and does away with the effect of variances and defects both in substance and form in [several parts of] the proceedings themselves. The first section directs that in all cases where an information (which need not be on oath unless a warrant issues in the first instance, sect. 10) is laid before a justice or justices, or complaint made (which *need not be in writing* unless the statute require it, sect. 8), a summons may issue according to the form in the schedule; and by sect. 2, in case of non-appearance, upon proof on oath of due service of the summons, *what shall be deemed by the justice* a reasonable time before the appointed day, he may, upon the information or complaint being substantiated on oath, issue his warrant accord-

ing to the form in the schedule: or in cases of convictions, where the original information is upon oath, he may issue such warrant in the first instance, or in cases where a summons issues without appearance, upon proof on oath of due service, a reasonable time (not as in case of issuing a warrant what *shall be deemed by the justice* a reasonable time) before the day appointed he may proceed *ex parte*, and adjudicate; and it is provided by sect. 1,—*that no objection shall be allowed to any information, complaint or summons for any alleged defect therein "in substance or in form,"*—or for any variance in the evidence; but if considered by the justice prejudicial to the defendant, the case may be adjourned. [See *Whittle v. Frankland*, 31 L. J. M. C. 81. Where the summons was for drunkenness and riotous behaviour, contrary to a special act, a conviction for drunkenness only was quashed, *Martin v. Pridgeon*, 28 L. J. M. C. 179; and see *R. v. Brickhall*, 33 L. J. M. C. 156.] Sect. 3 contains a similar provision as to warrants, with a similar power of postponement, and in the meanwhile commitment or enlargement upon recognizances according to forms in the schedule. Sect. 4 directs the mode in which the ownership of property is in certain cases to be stated. The seventeenth section provides that *the forms of convictions and orders in the schedule to the act*

may be used in all cases of convictions and orders under the authority of statutes hitherto passed, whether any particular form may have been therein given or not, and under all future statutes not giving a particular form of conviction or order. [See *R. v. Cridland*, 7 E. & B. 853; and *R. v. Hyde*, *ib.*, 859 note (a). On reference to the schedule it will be found that—in convictions (forms I 1—3) neither (1) the *information*—(2) the *summons*—(3) the *appearance* or *non-appearance* of the defendant are to be mentioned—and (4) the *evidence* is not to be set forth: and that—in orders (forms K 1—3) the *summons* is only to be mentioned if the defendant did not appear to it—the *evidence* is not to be set forth—but the facts entitling the complainant to the order, with the time and place at which they occurred, are to be stated.

The requisites of a conviction, which formerly must have been recorded in it, are:—]

1. *The information*, which is absolutely essential in all cases, excepting where the justice is empowered to convict on view (see 1 Wm. Saund. 262, note, *Jones v. Owen*, 2 D. & R. 600). It is *the foundation of his jurisdiction* over the case, without which his proceeding would be void (see *R. v. Bolton*, 1 Q. B. 66), and the same principle applies to other limited jurisdictions created by statute; thus, a presentment is the founda-

tion of the jurisdiction of commissioners of sewers, and if there be not one their rate is void, *Wingate v. Waite*, 6 M. & W. 739; and see the judgment in *Doe v. Bristol and Exeter Rail. Co.*, 6 M. & W. 320; *R. v. Croke*, Cowp. 26; and *Christie v. Unwin*, 11 A. & E. 373, where the same principle was held to apply even to the exercise of an authority conferred by statute on the chancellor; see also *R. v. Guardians of Hartley Union*, 1 Q. B. 677; [*Lee v. Rowley*, 8 E. & B. 857; and *In re Hopper v. Warburton*, 32 L. J. Q. B. 104.] The information need *not* have been *in writing* or even *on oath*, unless expressly directed by an act of parliament to be so, *Basten v. Carew*, 3 B. & C. 649. By the 11 & 12 Vict. c. 43, s. 10, whenever the justice issues a warrant in the first instance without summons, the information must be upon oath. [Objections cannot now usually be taken to the information for defects in substance, or form, or for variances between it and the evidence, 11 & 12 Vict. c. 43, ss. 1 and 9; still,] care should be taken in framing it, since it is the foundation of the magistrate's jurisdiction, *Cave v. Mountain*, 1 M. & Gr. 257; *Carpenter v. Mason*, 12 A. & E. 629. When there is no act giving a particular form, it is sufficient if the jurisdiction is substantially made apparent in the documents, or can be inferred therefrom, *Taylor v. Clemson*, *per Tindal*, L. C. J., 2

Q. B. 1032; [see *ex parte Baker*, 7 E. & B. 697]. Before the 11 & 12 Vict. c. 43, [ss. 1 and 9, the evidence would not] supply omissions in the information, for the office of the evidence is to *prove*, not to *supply* a legal charge, *R. v. Wheatmain*, Dougl. 232; *Wiles v. Cooper*, 3 A. & E. 528. It should state—the day on which it is exhibited; and the statement of a day inconsistent with, or insufficient to warrant the conviction, formerly vitiated it, *R. v. Kent*, 2 Lord Raym. 1546. It should state—the place of exhibiting, that the magistrate may appear to have been acting within his jurisdiction, see *R. v. Kite*, 1 B. & C. 101; and *R. v. Martin*, 2 Q. B. 1037; *Re Peerless*, 1 Q. B. 143. The name of the informer should, it seems, be set forth, that the defendant may know who is accusing him; in some cases, at all events, it is necessary, see *R. v. Stone*, 2 Lord Raym. 1545. It should state—the name and style of the convicting justice or justices, and show that he is acting within his jurisdiction. See *Kite's Case*, 1 B. & C. 101; *R. v. Martin*, 2 Q. B. 1036; *Re Peerless*, 1 Q. B. 143; *R. v. Inhabitants of St. George, Bloomsbury*, 4 E. & B. 520. Thus it [was before the statute above mentioned held not to] be enough to state that he is a justice *in* the county, without stating that he is *of* or *for* the county, *R. v. Dobbryn*, Salk. 473; —the name of the offender or

offenders, *R. v. Harrison*, 8 T. R. 508; the time of the offence, so that the information may appear to have been laid in due time, *R. v. Pullen*, Salk. 369; *R. v. Chandler*, Salk. 378; *R. v. Crisp*, 7 East, 389;—the *place*, that it may appear to have been within the justice's jurisdiction, *Kite's Case*, 1 B. & C. 101, *et notam*;—lastly, the charge should be set forth with proper and sufficient certainty, and contain every ingredient necessary to constitute the offence, leaving nothing to mere inference or intendment. "A conviction," to use the words of Lord Holt, "must be certain, and not taken by collection," *R. v. Fuller*, 1 Lord Raym. 509; *R. v. Trelawney*, 1 T. R. 222. Generally speaking, it is sufficient to state the offence in the words of the act creating it; see *R. v. Speed*, 1 Lord Raym. 583; *Davis v. Nest*, 6 C. & P. 167; *ex parte Pain*, 5 B. & C. 251; [*In re Perham*, 5 H. & N. 30; *Walsby v. Anley*, 30 L. J. M. C. 121]. Cases, however, may occur in which the words of the statute are so general as to render some more certainty in the conviction necessary; *per* Denison, J., *R. v. Jarvis*, 1 Burr. 154; *ex parte Hawkins*, 2 B. & C. 31; *R. v. Perrott*, 3 M. & C. 379. Exceptions in the statute creating the offence should be negatived where they appear in the clause creating the offence, *R. v. Clarke*, 1 Cowp. 35; *R. v. Jukes*, 8 T. R. 542; though it is otherwise when

they occur by way of proviso in subsequent clauses or statutes, *Cathcart v. Hardy*, 2 M. & S. 534; *Spiers v. Parker*, 1 T. R. 141; *R. v. Hall*, 1 T. R. 320. The 11 & 12 Vict. c. 43, s. 14, enacts, that whenever in cases of summary convictions the information or complaint negatives any exception, proviso, or condition, it shall not be necessary for the complainant to prove the negative, but the defendant may prove the affirmative in his defence. [See *Tennant v. Cumberland*, 1 E. & E. 401.] There are many cases where technical words, that would be necessary in an indictment for the same offence, are unnecessary in a conviction; see *R. v. Chandler*, 1 Lord Raym. 581; *R. v. Marsh*, 2 B. & C. 717. Although the information must, in order to give the magistrate jurisdiction, state an offence of which he has a right to take cognizance, it need not state evidence sufficient to support such a charge, for it is the *charge* which gives the jurisdiction, *Cave v. Mountain*, 1 M. & G. 261; *R. v. Bolton*, 1 Q. B. 66.

2. That the defendant was *summoned* or brought up by warrant; for it would be contrary to natural justice to convict without giving him an opportunity of being heard, *Painter v. Liverpool Gas Co.*, 3 A. & E. 433; and see *R. v. Totness*, 7 Q. B. 690; [*R. v. Lightfoot*, 6 E. & B. 822; *Cooper v. The Board of Works for the Wandsworth District*, 32 L. J.

C. P. 185; *Labalmondiere v. Frost*, 1 El. & El. 527; 28 C. J. M. C. 155; but, as before stated, the summons need not, according to the forms of conviction given by 11 & 12 Vict. c. 43, be mentioned in it. A general form of summons is given (form A) in the schedule to the act]. In some cases an act requires a summons of a particular kind, and in those the justices have no jurisdiction if it be omitted; thus, where the summons was to be *ten days at least* before conviction, and it was served on the 20th to appear on the 30th, the conviction was held void, *Mitchell v. Foster*, 9 Dowl. 527; 12 A. & E. 472. Where there is no statutable provision the summons should give him reasonable time, *R. v. Mallinson*, 2 Burr. 679; *R. v. Johnson*, 1 Str. 261; [see *In re Williams*, 21 L. J. 46]. If, indeed, he appear of his own accord, that will dispense with a summons, *R. v. Stone*, 1 East, 649. See *R. v. Justices of Wiltshire*, [12 A. & E. 793; and appearance and defence cures all defects in the summons, *R. v. Johnson*, *suprà*; see *R. v. Berry*, 28 L. J. M. C. 86]. If a summons be ineffectual, a warrant may, at least in some cases, be issued; see *Bane v. Methuen*, 2 Bing. 63: but then the information ought to have been upon oath; see *R. v. Payne*, Comberb. 359; *per Holt*, Barnard, 34; and it is the opinion of Mr. Paley that a warrant (in the absence of ex-

press enactment) lies only when the offence involves some breach of peace, Paley, 37, [4th ed. p. 74]. The 11 & 12 Vict. c. 43, now authorises justices to issue a warrant to compel appearance in all cases of summary convictions or orders.

3. The *appearance or non-appearance* of the defendant. [This need not now, according to the forms in 11 & 12 Vict. c. 43, be stated in the conviction.] If, being summoned, he do not appear, he may nevertheless be convicted, for otherwise any defendant might escape merely by not appearing, *R. v. Simpson* 1 Str. 44; and see 11 & 12 Vict. c. 43, ss. 2, 13, which enable the justice to convict on default of appearance, or to issue a warrant to compel appearance and adjourn the case, *R. v. Kingsby*, 15 J. P. 65; Cowp. 30.

4. If the defendant confess, [*the confession* must formerly have been] stated, [but see now the forms in 11 & 12 Vict. c. 43. If he does so, there is] no necessity for evidence, *R. v. Hall*, 1 T. R. 320; *R. v. Clarke*, Cowp. 35; even though the statute direct the conviction to be "on the oath of one or two credible witnesses": see *R. v. Hall*, *ubi suprà*; *R. v. Gage*, Str. 546, and 1 Wms. Saund. 262, *note*; see 11 & 12 Vict. c. 43, s. 14, under which the justice may convict the defendant at once, or make an order against him if he admit the truth of the information or complaint.

5. If the defendant [did] not confess, *the evidence* must [have been] set forth, [but should not be now, according to the forms given by 11 & 12 Vict. c. 43; as to the general applicability of those forms, see *R. v. Hyde*, 21 L. J. M. C. 94; *Re Allison*, 10 Exch. 361; 24 L. J. M. C. 73; *Geswood's Case*, 2 E. & B. 952]. It should be given in his presence. It is not necessary, in order to warrant the conviction, that the justices should clearly have come to a right decision in point of fact. If there was evidence from which any reasonable person might have drawn the same inference as they did, that will do, *R. v. Glossop*, 4 B. & Ad. 616; *Anon.* 1 B. & Ad. 382. Indeed, the magistrate being substituted for a jury, his decision cannot be said to be wrong if the evidence was such as might have been left to a jury, and from which they might have drawn the same conclusion, *R. v. Davis*, 6 T. R. 178. See now the general form of conviction, 11 & 12 Vict. c. 43, s. 17, and Sched. P.

6. There must be a judgment and an adjudication of the proper forfeiture, see *R. v. Harris*, 7 T. R. 238; *R. v. Salomons*, 1 T. R. 251; *R. v. Hawkes*, Str. 858; [*R. v. Cridland*, 7 E. & B. 866; *R. v. Williams*, 18 Q. B. 393; and *Labalmondriere v. Frost*, 1 El. & El. 527; 28 L. J. M. C. 155, S. C.; *In re Baker*, 2 H. & N. 219.] There is, however, no particular form of judgment, *R. v.*

Thompson, 2 T. R. 18. And the adjudication may be good in part though it exceed the jurisdiction of the justices, provided the excess be severable, *R. v. Justices of Wiltshire*, 12 A. & E. 793; *R. v. St. Nicholas*, 3 A. & E. 79. [See *Cross v. Watts*, per Byles, J., 13 C. B. N. S. 247, 248; 32 L. J. C. P. 73.] The application of the penalty, where the act directs any mode of applying it, is a necessary part of the judgment, *Chaddock v. Wilbraham*, 5 C. B. 645: [but see now 11 & 12 Vict. c. 43, Sched. (I. 2), (I. 3), and *R. v. Hyde*, 7 E. & B. 859, *in nota*]. It is sufficient in most cases to state that it is to be distributed or paid according to the form of the statute in such case made and provided, [*R. v. Hyde*, and the forms above referred to.] But, when the statute leaves the application discretionary, the mode in which the discretion was exercised ought to be stated, *R. v. Dempsey*, 2 T. R. 96. Where the justice is to give *costs or charges*, he must ascertain their amount in the conviction, *R. v. Symons*, 1 East, 189; [*Bott v. Acroyd*, 28 L. J. M. C. 207]; *R. v. St. Mary*, 13 East, 57; and as to costs, see now 11 & 12 Vict. c. 43, s. 18, and *R. v. Burton*, 13 Q. B. 389.

7. Lastly, the conviction should be subscribed, dated and sealed; see *R. v. Elwell*, Str. 794; *Basten v. Carew*, 3 B. & C. 649; and see 11 & 12 Vict. c. 43, s. 14, which requires the conviction or order to

be drawn up under the hand and seal of the justice. The reason of dating it is, that it may appear when it was made; and if that do appear, that is enough, and an impossible date might be rejected, *R. v. Picton*, 2 East, 198: see *R. v. Bellamy*, 1 B. & C. 500.

The above observations apply to convictions in general; but a conviction is the creature of the statute law; and, if a statute [passed after 11 & 12 Vict. c. 43] prescribe any particular form for it, no matter what, that form must be strictly pursued, *Davison v. Gill*, 1 East, 72; *Goss v. Jackson*, 3 Esp. 198.

[To proceed with the summary of the 11 & 12 Vict. c. 43,] sect. 5 makes aiders and abettors in the commission of offences punishable by summary conviction liable to the same punishment as principals. Sect. 6 extends the provisions of 11 & 12 Vict. c. 42, to this act, [but is not controlled by the 35th s. of 11 & 12 Vict. c. 42, see 26 & 27 Vict. c. 77.] Sect. 7 gives the justice power to enforce the attendance of any material witness within his jurisdiction, in the same manner as a defendant, and to commit for seven days any witness refusing to be sworn or to answer. Sect. 11 gives six months after the cause has arisen, in the absence of special enactment, as the time for complaint or information. [See *Eddleston v. Francis*, 7 C. B. N. S. 568; *Labalmondiere v. Addison*, 1 E. & E. 41; *Reeve*

v. Yeates, 1 H. & C. 435.] Sects. 12, 13, 14, and 16, contain precise directions as to the mode in which the hearing upon complaint and information is to be conducted. [As to s. 14, see *Ex parte Hayward*, 32 L. J. M. C. 89, and as to s. 16 see *Gelen v. Hall*, 2 H. & N. 739.] Sect. 15 makes prosecutors and complainants, not having a pecuniary interest in the result, competent witnesses. [The 17th section has been already noticed.] The 18th sect. enables the justice to order costs either to the prosecutor or complainant, or to the defendant. Sects. 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, relate to the mode in which penalties imposed, and costs ordered by justices are, under various circumstances, to be recovered and paid. See as to sect. 23, *Leverick v. Mercer*, 14 Q. B. 759. And see as the [proper] mode of [awarding] costs in cases of appeal under sect. 27, *R. v. Hellier*, 17 Q. B. 229; *R. v. Binney*, 1 E. & B. 810; and *R. v. Huntley*, 3 E. & B. 172; [*R. v. Justices of Ely*, 5 E. & B. 489; *Gay v. Matthews*, 4 B. & S. 425; 33 L. J. M. C. 14]. Sect. 32 enacts that the forms in the schedule shall be deemed good, valid, and sufficient in law. Sects. 33, 34, regulate jurisdictions of metropolitan police, and stipendiary magistrates; also of the lord mayor and aldermen of London. Sect. 35 provides that the act shall not extend to orders of removal,

orders as to lunatics, nor to informations concerning the excise, [see *R. v. Bakewell*, 7 E. & B. 848], customs, stamps, taxes, or post office, nor to orders, &c., in matters of bastardy, nor to proceedings under acts regulating the labour of children in factories, &c. An adjudication by two justices under the Lands Clauses Consolidation and Railway Clauses Consolidation Acts, 1845, as to the compensation payable by a railway company to a person whose lands have been injuriously affected by their works, is an order within sect. 1 of this act, and it is bad under sect. 11, if the complaint on which it is founded be made more than six months after the act complained of, *Re Edmundson*, 17 Q. B. 67.

If a conviction be void on the face of it, it follows, as of course, that no act done in pursuance of it can be justified, and that any seizure of person or property under it will form the subject-matter of an action, as will be seen in the principal case; subject, however, to the provisions of 11 & 12 Vict. c. 44, *ante*, pp. 676—679. But besides this, there are two modes of impeaching it, first by *appeal*, secondly by *certiorari*.

An *appeal*, like a *conviction*, is the creature of the statute law, and never lies unless where it is given by express terms, *R. v. The Recorder of Ipswich*, 8 Dowl. 103; *R. v. Hanson*, 4 B. & A. 521;

[*R. v. Justices of Warwickshire*, 6 E. & B. 837, *Ex parte Chamberlain*, 8 E. & B. 644. See also *R. v. Justices of Worcester*, 3 E. & B. 486; *R. v. Inhabitants of London*, 3 E. & B. 547; *A.-G. v. Sillem*, 10 H. of L. Ca. 704; 2 H. & C. 581; 33 L. J. Exch. 209]. The rule with regard to a *certiorari* is the very reverse. It always lies unless *expressly* taken away, *R. v. Abbot*, Dougl. 553; and it requires very strong words to do so; for even where a statute gave an appeal to the sessions, and directed that it should be *finally* determined there, and no other court should intermeddle with the causes of appeal, it was held that a *certiorari* lay after the appeal, *R. v. Moreley*, 1 W. Bl. 231; *R. v. Jukes*, 8 T. R. 542: see *R. v. Justices of West Riding, Yorkshire*, 1 A. & E. 575; where it was taken away, *R. v. Fell*, 1 B. & Ad. 380; *R. v. Justices of Lancashire*, 11 A. & E. 144, where an order in pursuance of a statute leaving the *certiorari*, but made by a town council empowered by 5 & 6 W. 4, c. 76, which takes it away, was held removable by *certiorari*. The reason of this is, that it is an extremely beneficial writ, being the medium through which the Court of Queen's Bench exercises its corrective jurisdiction over the summary proceedings of inferior courts. Even where it is taken away in express terms, they do not include the crown unless named, *R. v. Davies*,

5 T. R. 626; *R. v. Allen*, 15 East, 333; *R. v. Boulbee*, 4 A. & E. 498. Nay, it is said that the attorney-general, on behalf of the crown, might in such case obtain the writ for a defendant; see 1 East, 303, *note*, and the authorities there cited.

A *certiorari* is a writ, issuing out of the Court of Chancery or the Court of Queen's Bench, commanding the judges or officers of an inferior court to certify and return the record of a matter before them. It is used for a great variety of purposes; but we are at present looking only at its applicability to the case of a conviction. No writ of error lies upon a conviction; so that a *certiorari* is the only mode of bringing it into the Queen's Bench in order to reverse it. It is not, however, like a writ of error, granted *ex debito justitiæ*; but "application is made to the sound discretion of the court," *R. v. Bass*, 5 T. R. 252; *R. v. Manchester and Leeds Rail. Co.*, 1 P. & D. 164; *R. v. South Holland Drainage Committeemen*, 1 P. & D. 79. This application is by way of motion, and by 13 G. 2, c. 18, s. 5, "no *certiorari* shall be granted to remove any order, conviction, or other proceeding before a justice or at the sessions, unless it be applied for in *six calendar months*, and upon oath made that the party has given *six days' notice in writing* to the justice or justices, or two of them, if so

many there be;" see *R. v. Boughey*, 4 T. R. 281; *R. v. Bloxam*, 1 A. & E. 386; *R. v. Inhabitants of Sevenoaks*, 7 Q. B. 136; [*In re Hopkins*, E. B. & E. 100; *R. v. Allan*, 4 B. & S. 915; 33 L. J. M. C. 98; *R. v. Hodgson*, 5 Nov., 1863, 9 Law T. 290]. The notice to the justices must be six days before the rule *nisi* is moved for, one day inclusive, the other exclusive, *R. v. Goodenough*, 2 A. & E. 463; *R. v. Flounders*, 4 B. & Ad. 865. It must be by or on behalf of the party intending to move, and must appear to be so, *R. v. Justices of Lancashire*, 4 B. & Ad. 289; *R. v. Justices of Cambridgeshire*, 3 B. & Ad. 887; *R. v. Justices of Kent*, 3 B. & Ad. 250; *R. v. Justices of Lancashire*, 3 P. & D. 86; 11 A. & E. 144, where the notice was held sufficient; *R. v. Justices of Shrewsbury*, [9 Dowl. P. C. 524; S. C. *nom.*], *R. v. How*, 11 A. & E. 159. But the crown seems not to be bound by this even where it espouses the defendant's side, *R. v. James*, 1 East, 303, *note*; *R. v. Berkeley*, 1 Ken. 80; *R. v. Batams*, 1 East, 298. If, upon the discussion of the rule, the writ be granted, it removes the conviction into the court above, where it is quashed if bad; if good, it remains in the Queen's Bench, unless, indeed, to keep it there would occasion a defect of justice, in which case it may be sent back again by writ of *procedendo*, *R. v. Neville*, 2 B. & Ad. 299. The

person prosecuting the *certiorari* must by G. 2, c. 19, enter into recognizance for 50*l.*, with competent sureties to prosecute it with effect and pay costs if unsuccessful. This act does not, however, apply to the case of a prosecutor obtaining the writ, *R. v. Spencer*, 9 A. & E. 485.

The Court of Queen's Bench, exercising its appellate power over a conviction removed into it by *certiorari*, will not allow the merits of the case to be again litigated upon affidavit; for the justices are the proper persons to determine upon those. *R. v. Bolton*, 1 Q. B. 66; *R. v. Justices of Buckinghamshire*, 3 Q. B. 800; [If, however, by consent of the parties, the quarter sessions or a recorder has stated a special case, the court will decide on *certiorari* whether the facts stated in the case amount to the offence charged, even though the *certiorari* be taken away. *R. v. Dickenson*, 7 E. & B. 831]. But a question has occasionally arisen whether, in cases where the justices have proceeded *without jurisdiction*, and have nevertheless stated upon the face of the conviction matter showing a jurisdiction, it be competent to the defendant to prove the want of jurisdiction by affidavit. It certainly appears desirable that the court should have power to entertain the question of jurisdiction. Some cases might easily be suggested, in which not only great private but great public inconvenience might arise

from leaving an invalid order or conviction unreversed, and great injustice might be caused by allowing justices out of or in sessions, by making their order or conviction good upon the face of it, to give themselves a jurisdiction over matters not entrusted to them by the law.

Whether a *mandamus* would lie in such a case to oblige them to make a correct statement, is a question which the Court of Queen's Bench would, at least in the majority of instances, probably answer in the negative; for though it is true that in some cases, where there has been a clear omission of some material ingredient in a conviction, the court has by *mandamus* ordered it to be supplied; as in *Re Rix*, 4 D. & R. 352; *R. v. Marsh*, 4 D. & R. 260; *R. v. Warneford*, 5 D. & R. 489; *R. v. Allen*, 5 D. & R. 490; yet this has been done after the order or conviction had been returned upon a *certiorari*; and it either clearly appeared, or was shown by affidavit, to the court, that the whole or some material portions of the evidence had been omitted; (see the observations of the court on these cases in *R. v. Wilson*, 1 A. & E. 627;) and the *mandamus* went not to compel the court below to insert a *particular thing*, or raise a *particular question*, upon their return, but merely to oblige them to set out an integral part of the case, which *must have existed*, and had been omitted. I

say *must have existed*, because in *R. v. Wilson*, where evidence might or might not have been acted on, the court would not send the *mandamus*. And there are cases in which the court has refused to interfere by *mandamus* to compel the courts below to raise a *particular question*; for instance, in *R. v. Hewes*, 3 A. & E. 725, the jury had returned a verdict, *guilty by mischance*; the chairman of the sessions told them they *must* find a general verdict; and they then found a verdict of *guilty*, and recommended to mercy on the ground that the act was not done with a malicious intent. The motion was for a *mandamus* to set the clerk of the peace's minute right according to the facts, in order that a writ of error might be sued out. The rule was discharged. Mr. Justice Patteson said, "The case of a *mandamus* to enter continuances and hear is not like this. There the justices are ordered merely to hear an appeal, and to enter continuances because those are necessary in order to enable them to hear; so, in the present case, if it were necessary for the defendant to have a record made up, and the officer refused to do it, the party having a right to avail himself of the record might apply for a *mandamus*, as in *R. v. Justices of Middlesex*, 5 B. & Ad. 1113. I have always understood that this court might send a *mandamus* to an inferior court to do its duty *in general terms*, but *not to do a par-*

ticular thing, as to make an alteration here or there in the clerk of the peace's minutes;" see *R. v. Justices of Middlesex*, 9 A. & E. 546, judgment of Littledale and Coleridge, JJ., and *per curiam*, in *R. v. Lords of the Treasury*, 10 A. & E. 179; *R. v. Lords of the Treasury*, 10 A. & E. 374, and *per* Lord Denman in *R. v. Eastern Counties Railway*, 10 A. & E. 547; *R. v. Justices of Buckinghamshire*, 3 Q. B. 800; [*R. v. Justices of Bristol*, 18 Jur. 426, note a; *R. v. Dayman*, 7 E. & B. 672].

Supposing that the court below cannot be compelled by *mandamus* to show the defect of jurisdiction upon the record, the next question is, will the court above allow evidence of such defect of jurisdiction to be laid before it by way of affidavit, on the record being brought before it by a writ of *certiorari*? In *R. v. St. James's, Westminster*, 2 A. & E. 241, it was remarked by Mr. Justice Taunton (a judge whose *obiter dicta* are always worthy of the greatest attention,) that this has been constantly done. In *R. v. Inhabitants of Great Marlow*, 2 East, 244, an appointment of overseers, good on the face of it, was allowed to be questioned by affidavit on the ground of a defect of jurisdiction, and was finally quashed. The court in that case had taken time to consider as to the practice with regard to receiving the affidavit; and Mr. Justice Lawrence mentioned several similar cases in

which that course had been pursued. A similar course seems to have been pursued with an order of the quarter sessions in *R. v. Justices of the West Riding of Yorkshire*, 5 T. R. 629. In the case of *R. v. Justices of Cheshire*, 1 P. & D. 93, 8 A. & E. 400, the question was a good deal discussed; and it seems to have been admitted that affidavits might be looked at for the purpose of showing a defect of jurisdiction. "It cannot be disputed," says Mr. Justice Coleridge in that case, "that there are many cases in which affidavits may be looked at in order to ascertain whether there was jurisdiction or not; for suppose an order made, which was good on the face of it, but which was not made by a magistrate, it is clear that this fact may be shown to the court." Accord. *R. v. Sheffield and Manchester Rail. Co.*, [11 A. & E. 194]; and it seems to be settled by the later cases that a defect of jurisdiction may be shown by affidavit, though the proceeding is so drawn up as to appear valid on the face of it. [See the judgments in] *R. v. Bolton*, 1 Q. B. 66; [*The Whitbury, &c., Union Case*, 4 E. & B. 314; *In re Penny*, 7 E. & B. 660, where on *certiorari* an inquisition under the Lands Clauses Act, 1845, was quashed upon affidavits showing that the jury in assessing the damages took into account an item which was not a subject for compensation within the act (*Mortimer v. S. Wales Rail. Co.*,

E. & E. 375); *In re Hopkins*, E. B. & E. 100; *R. v. The Recorder of Cambridge*, 8 E. & B. 637; *R. v. Metropolitan Rail. Co.*, 32 L. J. Q. B. 367; *Read v. Victoria Station and Pimlico Rail. Co.*, 32 L. J. Exch. 167]; and *R. v. Cheltenham Paving Commissioners*, 1 Q. B. 467, where the defect consisted in the presence on the bench of interested parties as justices. On the other hand, nothing can be more common than to find it laid down that a conviction or order is conclusive of the matter *stated in it* for the purpose of showing a jurisdiction. See the judgment of Mr. Justice Patteson *In re Clarke*, 2 Q. B. 634. Possibly the distinction may be between cases in which the conviction or order is made by persons who are admitted to constitute a legal court, and who have stated facts which, on information being laid, or a case coming before them, would be matter to be proved, *and adjudicated upon by them*, and cases in which the objection is, that they are not a court at all, because not in fact magistrates, or because interested, because they sat out of the limit of their jurisdiction, or for some other reason, striking at their existence as a court, so that the objection is not that the statement of a court is erroneous, but that the source of the statement is not a court at all. [See the judgment of Bramwell, B., *In re Baker*, 2 H. & N. 219.

But it may well be doubted

whether this distinction affords a sufficient test. There appears to be much difference of opinion amongst the judges upon this subject; but it should seem that the Court of Queen's Bench will on *certiorari* entertain affidavits where the conviction is good on the face of it,—not only to show that preliminary matters required to give the justice jurisdiction to enter upon an inquiry into the merits of the case, were wanting, see *R. v. Bolton*, 1 Q. B. 66; *R. v. Badger*, 6 E. & B. 13; *R. v. Wood*, 5 E. & B. 49; *R. v. Justices of Totness*, 2 L. M. & P. 230; the judgments in *R. v. St. Olave's District Board*, 8 E. & B. 529; and *In re Smith*, 3 H. & N. 227—or that circumstances appeared in the course of the inquiry which ousted his jurisdiction, *R. v. Nunneley*, E. B. & E. 852; *R. v. Cridland*, 7 E. & B. 352; *R. v. Backhouse*, 30 L. J. M. C. 118; *R. v. Stimpson*, 4 B. & S. 301—but also that there was *no evidence* to prove some fact, the existence of which was essential to establish the offence charged. See *R. v. Stimpson*, per Blackburn, J. It must be remembered that before 11 & 12 Vict. c. 43, the evidence must have been set forth in the conviction, and if there was none to support some material part of the information, the conviction would have been quashed, *R. v. Smith*, 8 T. R. 588. The alteration by the statute of the forms of conviction, which dispenses

with the necessity of setting forth the evidence, plainly does not narrow the jurisdiction of the Court of Queen's Bench to quash writs void for matter of substance; and in order to exercise this jurisdiction in respect of convictions bad for want of evidence, but drawn up according to the general form given by the statute, it is necessary that the court should receive affidavits. See the judgments in *Bailey's Case*, 3 E. & B. 607, where affidavits were admitted for the purpose of impeaching a conviction under the Masters' and Servants' Act, 4 Geo. 4, c. 34, by showing that there was no evidence before the justices from which the relation of master and servant could be inferred. "Affidavits," said Pollock, C. B., *In re Baker*, 2 H. & N. 219, 223, "may be used for the purpose of showing that there was no evidence at all, but if there is conflicting evidence, it is for the justice to decide upon it." In *In re Thompson*, 6 H. & N. 193; 30 L. J. M. C. 19, S. C.; where the prisoner had been charged with unlawfully assaulting and abusing Susannah H., and it was plain *upon the evidence* that if any offence, a rape or assault with intent to ravish had been committed, yet the justices convicted the prisoner of a common assault, it appears to have been the opinion of Pollock, C. B., and Wilde, B., that the conviction was bad, because the justices could not have

believed that only a common assault had been committed. But the court was divided, and *Williamson v. Dutton*, 3 B. & S. 821, may be considered a decision contrary to that opinion.

As a general rule the jurisdiction of justices to convict summarily ceases as soon as a claim of title in himself (though only colourable, provided the right claimed be one known to the law) is *bond fide*; made by the party against whom the proceeding is instituted. See *R. v. Stimpson*, 4 B. & S. 301, where it was held that there was not reasonable evidence on which the justices could find that the claim was not set up *bond fide*; *Hudson v. McRae*, *ibid.*, 585; where the claim was made *bond fide*, but to a right impossible in law, and a conviction was upheld; *Leatt v. Vine*, 30 L. J. M. C. 207; *R. v. Cridland*, 7 E. & B. 853; *Cornwell v. Sanders*, 3 B. & S. 206. This rule is "not founded upon the existence of any clause in the act of parliament under which the proceeding is taken, as in the proceedings to enforce payment of church-rates and other similar cases, but on a general principle of law." Per Blackburn, J., *ibid.*, 215; and see *Williams v. Adams*, 2 B. & S. 342. In *R. v. Nunneley*, E. B. & E. 852, an order, made by justices for payment of a church-rate, under 53 Geo. 3, c. 127, which provides that if the validity of the rate be disputed, and the party

disputing gives notice to the justices, they are to forbear giving judgment thereon, was quashed on affidavits showing that a reasonable objection had been made to the validity of the rate, notwithstanding which the justices proceeded with the case, holding, groundlessly, that the objection was not made *bond fide*. Erle, J., said: "Without coming to the much disputed point whether a fact which is in doubt is one which affects the jurisdiction in the first instance, or one upon which magistrates are to judge, I think this case is clear enough. The jurisdiction of the justices is to decide whether the rate is made and demanded. But then there is a collateral point on which the jurisdiction depends, that is, whether the validity of the rate is disputed. If it is, the justices are to hold their hands. That is collateral to the merits; and a matter on which the jurisdiction depends. And as laid down in the judgment of *Bunbury v. Fuller*, 9 Exch. 140, 'it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends.' Then to take the simplest case: Suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred

this is clearly a collateral matter independent of the merits; on its being presented, the judge must not immediately forbear to proceed, and must inquire into its truth or falsehood, and for the time decide it, and either proceed or not on the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main question in consequence of an error, on this the Court of Queen's Bench will issue its *mandamus* or prohibition to correct his mistake." See further on this subject, *Leatt v. Vine*, 30 L. J. M. C. 207; *Legge v. Pardoe*, 30 L. J. M. C. 108; *In re Baker*, E. B. & E. 862; and *R. v. St. Olave's District Board*, 8 E. & B. 629; *R. v. Huntsworth*, 33 L. J. M. C. 131; *Ex parte Mannering*, 31 L. J. M. C. 153.

Although the conviction may be quashed for want of evidence to support it, it by no means follows that the convicting justice will be liable to any action in respect of *his erroneous judgment*. See *Sommerville v. Mirehouse*, 1 B. & S. 652; *Gwinne v. Poole*, 2 Lutw. 387, cited in *Kemp v. Neville*, 10 C. B. N. S., at p. 550. Thus, in such a case as *R. v. Nunneley*, the justices, it having been their duty there to form an opinion on the collateral question whether the validity of the rate was *bonâ fide* disputed (*R. v. Wrottesley*, 1 B. & Ad. 648, 651) were not liable to

an action, unless they acted without reasonable or probable cause in deciding that it was not *bonâ fide* disputed; *Pease v. Chaytor*, 3 B. & S. 620. Further illustrations of the distinction will be found in the lucid judgment in that case of Blackburn, J., who cites there from the judgment of Parke, B., in *Calder v. Halket*, 3 Moo. P. C. 28, 77: "It is well settled that a justice of the peace, acting judicially with a special authority, is not liable to an action of trespass for acting without jurisdiction, unless he had knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction: *Gelen v. Hall*, 2 H. & N. 379.]

Assuming that a defect of jurisdiction may in these cases be shown by affidavit, every case, or almost every case of a defect of jurisdiction in the convicting magistrate or magistrates would be reviewable by *certiorari*; for though it is now usual for the statute creating the offence to contain a clause taking away the *certiorari*, yet such clauses do not, generally speaking, apply to cases where there was no jurisdiction to convict, such cases not falling within the act of parliament at all, *R. v. Justices of Somersetshire*, 5 B. & C. 816; *R. v. Justices of the West Riding of Yorkshire*, 5 T. R. 629; *R. v. Inhabitants of Great Marlow*, 2 East, 244; [*R. v. Wood*, 5 E. & B. 49; S. C., *nom. R. v. Rose*, 24 L. J. M. C. 130]; nor do

they apply to cases where the conviction has been obtained *by fraud*, as when a maltster had by collusion, and for the purpose of exonerating himself from penalties, under 7 & 8 Geo. 4, c. 53, procured the conviction of his servant, *R. v. Gillyard*, 12 Q. B. 527. But there is a distinction between cases of a *want of jurisdiction* and an *irregularity in exercising it*: in the former case the *certiorari* lies notwithstanding the private clause, in the latter it is taken away. *R. v. Bristol and Exeter Rail. Co.*, 1 P. & D. 170, note, 11 A. & E. 202; *R. v. Sheffield and Manchester Rail. Co.*, 11 A. & E. 194; [*R. v. Justices of Warwickshire*, 6 E. & B. 837; *Lalor v. Bland*, 8 Irish C. L. R. 115]. In the former case, indeed, the court went to an extent which seemed likely very much to confine the applicability of the writ of *certiorari*; they threw out the opinion that in cases where the proceeding was merely irregular, the clause taking away the *certiorari* applied, and that where it was void there was no occasion for it, and that the court would not grant it. However, in the latter case, they appear disposed to repudiate the application of this dilemma; at all events, in cases in which the proceeding sought to be removed is not void on the face of it, but is impugned by affidavit. And in *R. v. Cheltenham Paving Commissioners*, 1 Q. B. 467, it was distinctly held

that in a case of malversation such a clause would not operate.

However, where the justice or justices *had* jurisdiction, the court will not grant a *certiorari* to remove the conviction or order upon a suggestion made by affidavit that they have exercised the jurisdiction wrongly; *R. v. Justices of Cheshire*, 1 P. & D. 88, 8 A. & E. 398; *R. v. St. James's, Westminster*, 2 A. & E. 241; for that would be to substitute the court above for the tribunal to which the statute has committed the inquiry.

[So, in effect, justices were often obliged to determine finally difficult points of law on questions of great general importance, without having sufficient materials, or time, for the purpose, and they could not obtain for their guidance any assistance by way of opinion, or decision, from the superior courts, see *R. v. Dayman*, 7 E. & B. 672; *R. v. Paynter*, *Ibid.* 328. This defect in the law has been remedied by the Justices' Special Case Act, 20 & 21 Vict. c. 43, by which magistrates are enabled, and may be compelled, to state cases for the opinion of any of the superior courts. The 2nd section of this statute provides that after the hearing (*Bradshaw v. Vaughton*, 30 L. J. C. P. 93) and determination (*Davys v. Douglas*, 4 H. & N. 183; S. C. 28 L. J. M. C. 193) by a justice or justices of *any information or complaint which they have power to determine summarily* (*Townsend v. Reed*,

10 C. B. N. S. 308; *Ex parte May*, 2 B. & S. 426; 31 L. J. M. C. 161, S. C.), either party to the proceeding may, if dissatisfied with the determination (*Davys v. Douglas*), as erroneous in point of law (*Newman*, app., *Baker*, resp., 8 C. B. N. S. 200; *Taylor v. Smart*, 31 L. J. M. C. 252; *Hargreaves v. Taylor*, 33 L. J. M. C. 111), apply in writing within three days, to the justice or justices, to state and sign a case, setting forth the facts, and the grounds of the determination, for the opinion of any one of the superior courts of law. Within three days after receiving the case the appellant is to transmit it (*Banks v. Goodwin*, 3 B. & S. 548; 32 L. J. Q. B. 87, S. C.; *Pennell v. Uxbridge*, 31 L. J. M. C. 92; *Local Board, &c. of Gloucester v. Gardner*, 32 L. J. M. C. 66) to the court named in his application, first giving (*Ashdown v. Curtis*, 31 L. J. M. C. 216) written notice of the appeal (*Crick v. Ockmand*, Q. B. 17 Jan. 1863), with a copy of the case so written and signed, to the other party (As to these conditions to the right of appeal, see *Peacock v. Wood*, 4 C. B. N. S. 264; *Morgan v. Edwards*, 5 H. & N. 415; *Syred v. Carruthers*, E. B. & E. 469; *Woodhouse v. Wood*, Q. B. 21st Nov. 1859, 29 L. J. M. C. 149.) By sect. 3 the appellant on applying for the case (*Chapman v. Robinson*, E. & E. 25) must enter into a recognizance (*Stanhope v. Thorsby*, 35 L. J. M. C. 182) and pay

certain fees, and then upon a condition being added to the recognizance for his appearance before the justices to abide by their judgment if unreversed, he will, if in custody, be entitled to his liberty. By sect. 4, the justices, if of opinion that the application is merely frivolous (and provided it was not directed by the attorney-general), may refuse to state the case; but then by sect. 5, the Court of Queen's Bench may grant a rule calling upon them and the respondent to show cause why they should not do so, and may make the rule absolute, or discharge it with or without costs. By sect. 6 the court to which the case is transmitted may hear and determine the questions of law arising upon it (*Governors, &c., of St. James, Westminster v. Battersea, Overseers of*, C. P. 6 Jur. N. S. 100, *Jones v. Taylor*, 1 E. & E. 20), and reverse, affirm, or amend the determination, or remit the matter to the justices with the opinion of the court, or may make such other order in relation to the matter (*Shackell v. West*, 29 L. J. M. C. 45), and such orders as to costs as to the court shall seem fit; and all such orders are final and conclusive on all parties. The same section provides that the justices are not to be liable for any costs of the appeal. (As to the costs of the appeal, see *Venables v. Hardman*, E. B. & E. 79.) By sect. 7 the case may

be remitted to the justices for amendment, *Christie v. Guardians of St. Luke's*, 8 E. & B. 992; *Yorkshire Tire and Axle Co. v. Rotherman, &c.*, 4 C. B. N. S. 366; *Rider v. Wood*, 29 L. J. M. C. 1. By sect. 8 the powers given to the superior court may be exercised by a judge of the court sitting in chambers in term time or in vacation. Sect. 9 authorises the justices to enforce any conviction or order, affirmed, amended, or made by the superior court, and exempts them from liability by reason of any defect in such conviction or order; see *Waller v. G. W. Rail. Co.*, 29 L. J. M. C. 107. By sect. 10 no *certiorari* or other writ is required for the removal of the conviction, order, or determination, in reference to which the case is stated. Sect. 11 enables the superior courts to make rules for the practice and proceedings under the act. Sect. 13 relates to recognizances taken under the act, and sect. 14 deprives parties who appeal under the act, of their appeal to quarter sessions. In the *Luton Local Board of Health v. Davis*, Q. B. 29 L. J. M. C. 173, the court appears to have allowed an appeal, under this act, against the determination of justices not to issue a distress warrant for non-payment of an assessment to a rate which was good on the face of it, and had not been appealed against to quarter sessions; but see *Ib.* 175, note 5, and the cases there noticed.]

Though it has been endeavoured

to show that the Queen's Bench has a right in case of defect of jurisdiction to entertain the objection founded upon such defect on affidavit, yet it must be observed that the court is not bound to do so upon *certiorari*; for a *certiorari*, as has been already pointed out, is a writ not of right, but in the discretion of the court to grant or to refuse; (but see the judgment in *Symonds v. Dimsdale*, 2 Exch. 533). And cases may occur in which, though there may have been a defect of jurisdiction, still the court may conceive that the interests of justice would be rather impeded than advanced by any summary interference on their part. In *R. v. Justices of Cambridgeshire*, 4 B. & Ad. 122, Mr. Justice Patteson said, "With regard to the objections in point of jurisdiction, I protest against its being understood that we can on every occasion look into extrinsic matter on motions to bring up orders by *certiorari*." "We must be cautious," said Mr. Justice Coleridge, "not to exceed our jurisdiction; and when we find there is a court of appeal below, to which the matter brought before us on affidavit might have been carried, I think we are confined to objections appearing on the face of the order." I do not understand these observations of the learned judges as importing that there are cases of a total defect of jurisdiction which the Court of Queen's Bench has no power to entertain on affidavit,

but that the leaning of the court is against doing so, except where public justice would be thereby furthered. See *R. v. Justices of Denbighshire*, 1 B. & Ad. 616. See *R. v. South Holland Drainage Committeemen*, 1 P. & D. 79; *R. v. Manchester and Leeds Rail. Co.*, 1 P. & D. 164. And that its disinclination to interfere is strong and uniform in cases where the legislature has provided another competent tribunal of appeal to which the question might be carried. See *R. v. Justices of Middlesex*, 9 A. & E. 548, *last point*. In *Ex parte Lord Gifford*, Carrow's Sess. Cas. 490, Mr. Justice Williams refused a *certiorari* on the ground that if the recognizance sought to be removed were *void*, the applicant might treat it accordingly. It has not, however, been usual to refuse the writ for this reason, which, since the 11 & 12 Vict. c. 44, s. 2, prohibiting actions against justices, &c., for anything done under convictions or orders made without jurisdiction until they have been quashed, would scarcely be given in answer to an application to bring up a conviction or order to have them quashed for a defect of jurisdiction.

In *R. v. Justices of Cambridgeshire*, 3 B. & A. 887, Lord Denman, in his judgment, suggested another ground on which an application upon affidavit might possibly be entertained. "I do not say," said his lordship, "that even on *certiorari* the court would not set aside an order if *manifest*

fraud were shown. That may be so. In *R. v. The Justices of Somersetshire*, 5 B. & C. 816, where a *certiorari* was applied for to remove an appointment of overseers, on a suggestion of corrupt motives in the appointing magistrates, the court refused a rule, saying that the parties complaining might appeal to the sessions, or move for a criminal information. Notwithstanding that refusal, however, I do not say that if corruption were clearly made out, the court would not, upon an application like this, declare the order invalidated by the fraud." This observation of his lordship is consistent with the principle laid down by *De Grey, C. J.*, in the *Duchess of Kingston's Case*, *post*, volume 2, where his lordship observed that "fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice." Lord Coke says, "it avoids all judicial acts, ecclesiastical or temporal." [See *Shedden v. Patrick*, 1 Macq. H. of Lords C. 535; and the nullity of the judgment or decree obtained by it, though the judgment or decree has not been set aside or reversed, may be alleged in a collateral proceeding, see the opinion of Willes, J., in *R. v. Saddlers' Co.*; 3 El. & El. 42; 10 H. of L. Ca. 404; 32 L. J. Q. B. 347.] And see *R. v. Gillyard*, *ante*, 695, where fraud being shown, a conviction obtained by means thereof was brought up by *certiorari* and quashed.

LICKBARROW v. MASON.

IN B. R. CAM. SCACC. ET DOM. PROC.

[REPORTED 2 T. R. 63; 1 H. BL. 357; AND 6 EAST, 21.]

The vendee of goods may, by assignment of the bills of lading to a bonâ fide transferee, defeat the vendor's right to stop them in transitu, in case of the vendee's insolvency.

The consignor may stop goods in transitu before they get into the hands of the consignee, in case of the insolvency of the consignee: but, if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person.

TROVER for a cargo of corn. *Plea*, the general issue. The plaintiffs, at the trial before *Buller, J.*, at the Guildhall sittings after last Easter Term, gave in evidence that Turing and Son, merchants at *Middlebury*, in the province of Zealand, on the 22nd of July, 1786, shipped the goods in question on board the *Endeavour* for *Liverpool*, by the order and directions and on the account of Freeman, of *Rotterdam*. That Holmes, as master of the ship, signed four several bills of lading for the goods in the usual form *unto order or assigns*: two of which were indorsed by Turing and Son, in blank, and sent, on the 22nd of July, 1786, by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing and Son; and the remaining one was kept by Holmes. On the 25th of

July, 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to 477*l.*, in respect of the price of the goods, which were afterwards accepted by Freeman. On the 25th of July, 1786, Freeman sent to the plaintiffs the two bills of lading, together with the invoice which he had received from Turing and Son, in the same state in which he received them, in order that the goods might be taken possession of and sold by them on Freeman's account; and on the same day Freeman drew three sets of bills of exchange to the amount of 520*l.* on the plaintiffs, who accepted them, and have since duly paid them. The plaintiffs are creditors of Freeman to the amount of 542*l.* On the 15th of August, 1786, and before the four bills of exchange drawn by Turing and Son on Freeman became due, Freeman became a bankrupt: those bills were regularly protested, and Turing and Son have since been obliged, as drawers, to take them up and pay them. The price of the goods so shipped by Turing and Son is wholly unpaid. Turing and Son, hearing of Freeman's bankruptcy on the 21st of August, 1786, indorsed the bill of lading so retained by them to the defendants, and transmitted it to them, with an invoice of the goods, authorising them to obtain possession of the goods on account of, and for the use and benefit of, Turing and Son, which the defendants received on the 28th of August, 1786. On the arrival of the vessel with the goods at *Liverpool*, on the 28th of August, 1786, the defendants applied to Holmes for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them for and on account of, and to and for the use and benefit of, Turing and Son. The defendants sold the goods on account of Turing and Son, the proceeds whereof amounted to 557*l.* Before the bringing of this action the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs nor Freeman have paid or offered to pay the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

This was argued in last Trinity Term by *Erskine* in support of the demurrer, and *Manly* against it; and again, on this day, by *Shepherd*, in support of the demurrer, and *Bearcroft* *contra*.

Shepherd (a), after observing that, as the defendants were the agents of Turing and Son, the general question was to be considered as between the consignor and the indorsee of the bill of lading, contended, first, that, as between the vendor and vendee of goods, the former has a right to stop the goods *in transitu*, if the latter become insolvent before the delivery of them. And, secondly, that such right cannot be divested by the act of the vendee's indorsing over the bill of lading to a third person. The first question has been so repeatedly determined, that it is scarcely necessary to cite any authorities in support of it. (The plaintiff's counsel admitted the position.) Then, in order to determine the second, it is material to consider the nature of a bill of lading. A bill of lading cannot by any means be construed into a contract on the part of the consignor to deliver the goods mentioned in it to the consignee; it is only an undertaking by the captain to deliver the goods to the order of the shipper. As between the consignor and consignee, it is a bare authority to the captain to deliver, and to the consignee to receive them. That this is the true nature of a bill of lading appears from all the writers upon mercantile law, as Molloy, Postlethwayte, and Beawes. If it be any other sort of instrument, it must be contended to amount to a contract by the consignor to deliver the goods to the consignee; but no such contract arises upon it, because the consignor is not even a party to it; and no action could be framed upon it against the consignor. Then, if it be only a bare authority to the one to carry, and to the other to receive the goods, the consignee cannot transfer a greater right than he has; neither can the right of the consignor be divested by the act of the consignee. If a bill of lading be a negotiable instrument, and convey an indefeasible property in the goods, it must be so by the custom of merchants; but such custom is

(a) As the second argument, with the judgment of the court, comprehended everything that was said upon the subject, the former argument is omitted.

Argument for
the defendants.

(a) 1 Atk. 245.

not to be found in any of the books treating upon the subject. There are cases which establish a contrary doctrine, in which the courts have held that the rights of the assignees are the same as the rights of the original consignees. It cannot, indeed, be disputed but that, as between the consignee and the indorsee, the indorsement of a bill of lading is a complete transfer of the property which the consignee has in it; but the cases go no further. The case of *Snee and Prescott* (a) is precisely similar to the present. There the bill of lading was indorsed in blank, and afterwards indorsed over by the consignee to his assignees: those assignees were some of the defendants in that suit, and they stood in the same situation with the present plaintiffs. In that case, before the goods arrived, and after the indorsement of the bill of lading by the consignee, the consignee having become a bankrupt, the goods were stopped *in transitu* by order of the consignor, by an indorsement of the bill of lading, which was left with him, to another of the defendants: there Lord *Hardwicke* decreed that the indorsement did not absolutely transfer the property in the goods, in the event of the consignee's becoming a bankrupt before the arrival of the goods; that as the goods had been stopped *in transitu*, by order of the consignor, he had a right to detain them till the sum which he was in advance to the consignee on account of them was paid; and that the surplus arising from the produce of the goods should be paid to the indorsees of the consignee. Now, unless Lord *Hardwicke* had been of opinion that the indorsement by the consignee did not absolutely transfer the property in the goods, he would have decreed that the indorsees should have been first paid the money which they had advanced upon the credit of the bill of lading, and then that the surplus should have been paid to the consignor; but instead of that, he gave a priority to the consignor. This doctrine is not only laid down in a court of equity, but confirmed in a court of law in the case of *Savignac and Cuff* (b), where the same question was tried between the same parties as at present. There Salvetti, a merchant in

(b) Sittings at
Guildhall, cor.
Lord Mans-
field, Tr. 1778.

Italy, consigned a quantity of skins to Lingham, residing in *London*, and sent him a bill of lading indorsed in blank. Lingham, the consignee, indorsed it to Savignac for a valuable consideration, at the invoice price, showing him at the same time the letters of advice and the bills of parcels. The consignee not accepting the bills of exchange which the consignor had drawn upon him for the amount of the goods, the consignor indorsed the bill of lading remaining in his hands to Cuff, the defendant, with orders to seize the goods before they got into the hands of the consignee, which he did; and the action was brought against him by the indorsee of the consignee to recover the value of the goods. *Wallace*, Solicitor-General, there argued that by the indorsement of the bill of lading the property was transferred. But Lord *Mansfield* was of opinion, that the consignor had a right to stop the goods *in transitu* in case of the insolvency of the consignee, and that the plaintiff, standing in the same situation with the original consignee, had lost his lien. Lord *Mansfield* was first of opinion, that there was a distinction between bills of lading indorsed in blank and otherwise; but he afterwards abandoned that ground. But in that case, as the consignor had in point of fact received 150*l.* from the consignee, there was a verdict for the plaintiff for that sum. So that the result of the verdict was, that the consignor was entitled, under those circumstances, to retain all the goods consigned, deducting only the sum which he had actually received for part. Both these cases establish the construction of the bill of lading contended for: and it is to be observed that the verdict in the latter one was acquiesced in. And indeed to construe it otherwise would be opening a great door to fraud, and would be placing the indorsee of a consignee of a bill of lading in a better situation than the consignee himself in case of his insolvency. Suppose the consignee assign over to a third person, who becomes insolvent before the delivery of the goods, such assignee would then, notwithstanding his insolvency, have a right to get the goods into his possession; for if the act of indorsement

Argument for
the defendants.

Argument for
the defendants.

absolutely divests the property out of the consignor, he can never afterwards get possession of the goods again; or else this consequence would follow, that vendor would have a right to seize the goods *in transitu* till the indorsement, by which his right would be divested, and that by the act of insolvency of the indorsee it would be revested. This has never been considered to be the same sort of instrument as a bill of exchange; they are not assimilated to each other in any treatise upon the subject: nay, bills of exchange are said to be *sui juris*. In their nature they are different: a bill of exchange always imports to be for value received; but the very reverse is the case with a bill of lading. For in few, if any, instances, is the consignor paid for his goods till delivery; and bills of exchange were first invented for the purpose of remitting money from one country to another, which is not the case with bills of lading. As to the case of *Wright* and *Campbell* (a), which may be cited on the other side, it will perhaps be said that the court awarded a new trial only on the ground of fraud: but *non constat* that, if there had been no suspicion of fraud, a new trial would not have been granted. So that the law cannot be considered to have been decided in that case; for when a new trial is moved for, if the facts warrant it, the court awards a new trial without going into the law arising upon those facts. In such cases the law is still left open to be considered on a different finding; since it would be nugatory to determine the point of law, which may not perhaps be applicable to the facts when found. At the most, there is only an inference of law to be drawn from that case, which is not sufficient to overturn established principles. Besides, this case is distinguishable from that; for there it appeared that the consignee was the factor of the consignor, and as such might bind his principal by a sale.

(a) 4 Burr.
2046.

Argument for
the plaintiffs.

Bearcroft, contra.—The question is, whether the *bond fide* indorsement for a valuable consideration of a bill of lading to a third person is not an absolute transfer of the whole property? This question is of infinite importance to the mercantile world, and has never yet been put in a

way to receive a solemn decision in a court of law. For at most it has only been considered in a court of equity upon equitable principles, or at *Nisi Prius* in a case the correct state of which is to be doubted. The form of the bill of lading is material to be attended to in determining this case; it is, that the goods are to be delivered "*to order or to assigns*;" therefore, on the very face of the instrument, there is an authority to the captain to deliver them to the consignee *or to his assigns*; and the question here is, who are his *assigns*? As between the consignor and consignee the rule contended for is not now to be disputed, since it has been confirmed by so many authorities; though, perhaps, it were much to be wished that it had never been established: but there will be danger in extending it farther. With respect to the case of *Snee and Prescott*, when it is considered who were the parties to the cause, in what court, and upon what principles it was decided, it will not be found sufficient to determine the present case. The actors, the plaintiffs, were not the innocent purchasers of a bill of lading; they were the assignees of a bankrupt, and prayed by their bill to get possession of the goods, notwithstanding they had not paid for them. But this is a case between the consignor and third persons who have paid a valuable consideration for the goods; that case was likewise in a court of equity, where the leading principle is, that *he who seeks equity, must first do what is equitable*; there too the decision was founded, in some measure, on the custom of the *Leghorn* trade, and the construction of the statute relating to mutual credit; so that there were united a number of circumstances which, taken altogether, induced Lord *Hardwicke's* decree, and which do not exist in the present case. And it is to be remarked that Lord *Hardwicke*, thinking it a harsh demand against the consignors, said, "he would lay hold on anything to save the advantage" which the consignors had, by regaining the possession of the goods before they got into the hands of the indorsees of the consignee. Then, as to the case of *Savignac v. Cuff*, that had not even the authority of a *Nisi Prius*

Argument for
the plaintiffs.

Argument for
the plaintiffs.

(a) 1 Lord
Raym. 271.

(b) *Vide Hib-*
bert v. Carter,
1 T. R. 745.

determination. Lord *Mansfield* gave no opinion upon this question; for though he said there was no doubt but that, as between the vendor and the vendee, the former might seize the goods *in transitu*, if the latter became insolvent before they were delivered, yet there he stopped: so that the inclination of his mind may be presumed to have been against extending the rule. And, after all, the whole circumstances of that case were left to the consideration of a jury. Since Lord *Raymond's* time (a) it has been taken to be clear and established law that a general indorsement of a bill of lading does transfer the property. And *Holt*, C. J., then said "that a consignee of a bill of lading has such a property as that he may assign it over." It has now been contended that the right of the consignor ought not to be divested by the act of the consignee: but it is not by the act of the consignee alone; for the consignor has by his own act enabled the consignee to defeat his right. If he had been desirous of restraining the negotiability of the bill of lading, instead of making a general indorsement, he should have made a special indorsement to his own use. And then the holder of the bill of lading would have been considered as a trustee for the consignor. The custom of merchants has established that the delivery of a bill of lading transfers the whole property, *Evans v. Martlett*, 1 Lord Raym. 271; *Wright v. Campbell*, 4 Burr. 2046; and *Caldwell v. Ball*, ante, 1 vol. [T. R.], 205 (b). Then it has been said, that a bill of lading is not transferable like a bill of exchange: but the custom of merchants has made that transferable which in its nature perhaps is not so; and the cases above referred to decide that point. Though a new trial in the case of *Wright v. Campbell* was granted on a suspicion of fraud, and the law was not expressly adjudged; yet from what was said by the Court it may be collected that no new trial would have been awarded, if no fraud had existed; and the opinion of Lord *Mansfield*, as far as it goes, is expressly in point. But, above all arguments, public convenience ought to have a considerable influence in the decision of this question. By

the constant course and the universal consent and opinion of merchants, bills of lading are negotiable; it is highly convenient to trade that they should be so; and if this case should be determined against the plaintiffs, one of the principal currents of trade will be stopped: besides, it will be a hardship on an innocent vendee.

Argument for
the plaintiffs.

Shepherd, in reply.—Though there may be some hardship on the vendee if he be to suffer, yet the hardship would be equally great on the vendor, who would by a decision against him be compelled to deliver up the possession of his goods, though at the time of the delivery he knew that he should not receive any consideration for them. But convenience requires that, if one of these two innocent persons must suffer, the loss should be sustained by the consignee. For when a vendor consigns his goods, he knows that by the general law he has a right to stop them *in transitu*, if the consignee become insolvent before delivery. But when an indorsee takes an assignment of a bill of lading, he takes it with the knowledge of, and subject to, that general right which the vendor has. Though the case of *Snee v. Prescott* was determined in a court of equity, yet that court could not alter the effect and nature of a legal instrument; which it must have done in that case if the right of an indorsee is to be preferred to the consignor. Suppose A. sends a bill of lading of goods to B., and the goods themselves are in fact never sent out of his possession; if the indorsement of the bill of lading can be said to transfer the property, the indorsee would have a right to recover the goods as against the original consignor, who had never parted with the possession of them. So that the rule contended for would not only divest the right which the consignor has to seize the goods *in transitu*, but would also compel him to part with his goods, without receiving any consideration, although he had never relinquished the possession. The meaning of the dictum of Lord *Holt*, in *Evans v. Martlett*, is only that the consignee may assign over that right which he has. The case of *Caldwell v. Ball* was merely a question between two solvent indorsees, both of whom had an

Reply.

Reply.

equitable title; and that case only decided that he who first got possession of one of the bills of lading was entitled to the goods; and there, too, the Court determined in favour of him who had the possession.

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Ashhurst, J.

Ashhurst, J.—As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, we were for that reason desirous of having the matter argued a second time, rather than on account of any great doubts which we entertained on the first argument. We may lay it down as a broad general principle, that *wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.**

* [See *Swan v. The British Australasian Co.*, 7 H. & N. 603; 81 L. J. Exch. 425, S. C.; affirmed in error, 82 L. J. 250; *Foster v. Green*, 7 H. & N. 881; *Udell v. Atherton*, 7 H. & N. 786; *Collingwood v. Berkeley*, 15 C. B. N. S. 145.]

If that be so, it will be a strong and leading clue to the decision of the present case. It has been argued, that it would be very hard on a consignor, who had received no consideration for his goods, if he should be obliged to deliver them up in case of the insolvency of the consignee, and come in as a creditor under his commission for what he can get. That is certainly true: but it is a hardship which he brings upon himself. When a man sells goods, he sells them on the credit of the buyer: if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately become a bankrupt. But where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the meantime, the vendor may stop the goods *in transitu*. But, as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect, therefore, this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an indorsable instrument. So it is like a bill of

exchange; in which case, as between the drawer and the payee, the consideration may be gone into, yet it cannot between the drawer and the indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be inquired into; though when third persons are concerned, it cannot. This is also the case with respect to a bill of lading. Though the bill of lading in this case was at first indorsed in blank, it is precisely the same as if it had been originally indorsed to this person; for when it was filled up with his name, it was the same as if made to him only. Then what was said by Lord *Mansfield* in the case of *Wright v. Campbell* goes the full length of this doctrine: "If the goods be *bonâ fide* sold by the factor at sea, (as they may be where no other delivery can be given,) it will be good notwithstanding the statute 21 Jac. 1, c. 19. The vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee, because the goods were sold *bonâ fide*, and by the owner's own authority. Now in this case the goods were transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority, the property is altered. And I am of opinion that this right of the assignee could not be divested by any subsequent circumstances.

Buller, J.—This case has been very fully, very elaborately, and very ably argued, both now and in the last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument. Before I consider the effect of the several authorities which have been cited, I will take notice of one circumstance in this case which is peculiar to it; not for the purpose of founding my judgment upon it, but because

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I would not have it supposed in any future case that it passed unnoticed, or that it may not hereafter have any effect which it ought to have. In this case it is stated that there were four bills of lading: it appears by the books treating on this subject, that according to the common course of merchants there are only three; one of which is delivered to the captain of the vessel, another is transmitted to the consignee, and the third is retained by the consignor himself, as a testimony against the captain in case of any loose dealing. Now, if it be at present the established course among merchants to have only three bills of lading, the circumstance of there being a fourth in this case might, if the case had not been taken out of the hands of the jury by the demurrer, have been proper for their consideration. I am aware that that circumstance appears in the bill, on which is written, "in witness the master hath affirmed to four bills of lading, all of this tenor and date." But we all know that it is not the practice either of persons in trade or in the profession to examine very minutely the words of an instrument which is partly printed and partly written; and if we only look at the substance of such an instrument, this may be the means of enabling the consignee to commit a fraud on an innocent person. Then how stood the consignee in this case? He had two of the bills of lading, and the captain must have a third; so that the assignee could not imagine that the consignor had it in his power to order a delivery to any other person. But I mean to lay this circumstance entirely out of my consideration in the present case, which I think turns wholly on the general question: and I make the question even more general than was made at the bar, namely, *whether a bill of lading is by law a transfer of the property?* This question has been argued upon authorities; and before I take notice of any particular objections which have been made, I will consider those authorities. The principal one relied on by the defendants is that of *Snee v. Prescott*. Now, sitting in a court of law, I should think it quite sufficient to say, that that was a determination in a court of equity, and founded on equitable principles. The

leading maxim in that court is, that *he who seeks equity must first do equity*. I am not disposed to find fault with that determination as a case in equity; but it is not sufficient to decide such a question as that now before us. Lord *Hardwicke* has, with his usual caution, enumerated every circumstance which existed in the case: and, indeed, he has been so particular, that if the printed note of it be accurate, which I doubt, it is not an authority for any case which is not precisely similar to it. The only point of law in that case is upon the forms of the bills of lading; and Lord *Hardwicke* thought there was a distinction between bills of lading indorsed in blank, and those indorsed to particular persons: but it was properly admitted at the bar that that distinction cannot now be supported. Thus the matter stood till within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in *Snee v. Prescott* that Lord *Hardwicke* himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord *Mansfield*, who may be truly said to be the founder of the commercial law of this country. I hope to show, before I have finished my judgment, that there has been no inconsistency in any of his determinations: but if there had, if I could not reconcile an opinion which he had de-

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livered at *Nisi Prius* with his judgment in this court, I should not hesitate to adopt the latter in preference to the former; and it is but just to say, that no judge ever sat here more ready than he was to correct an opinion suddenly given at *Nisi Prius*. First, as to the case of *Wright v. Campbell*, that was a very solemn opinion delivered in this court. In my opinion that is one of the best cases that we have in the law on mercantile subjects. There are four points in that case, which Lord *Mansfield* has stated so extremely clear that they cannot be mistaken: The first is, what is the case as between the owner of the goods and the factor; the second, as between the consignor and the assignee of the factor with notice; thirdly, as between the same parties without notice; and, fourthly, as to the nature of a bill of sale of goods at sea in general. It is to be recollected that the case of *Wright v. Campbell* was decided by the judge at *Nisi Prius* upon the ground that the bill of lading transferred the whole property at law: and when it came before this court on a motion for a new trial, Lord *Mansfield* confirmed that opinion; but a new trial was granted on a suspicion of fraud: therefore it is fair to infer, that if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the same as if the question were tried between the consignor and the original consignee. According to a note of *Wright v. Campbell*, which I took in court, Lord *Mansfield* said, that since the case in Lord *Raymond*, it had always been held that the delivery of a bill of lading transferred the property at law; if so, every exception to that rule arises from equitable considerations which have been adopted in courts of law. The next case is that of *Savignac v. Cuff*, the note of which is too loose to be depended upon: but there is a circumstance in that case which might afford ample ground for the decision; for I cannot suppose that Lord *Mansfield* had forgotten the doctrine which he laid down in this court in *Wright v. Campbell*. There he observed very minutely on what did not appear at the trial, that no letters were produced, and that no price was

fixed for the goods: but in *Savignac v. Cuff*, the plaintiff had not only the bills of lading and the invoice, but he had also the letters of advice, from which the real transaction must have appeared; and if it appeared to him that Selvetti had not been paid for the goods, that might have been a ground for the determination. The case of *Hunter v. Beal* (a) does not come up to the point now in dispute; it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till delivery of the goods. With respect to the case of *Stokes v. La Riviere* (b), perhaps there may be some doubt about the facts of it: however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties: that case, therefore, does not impeach the doctrine laid down in *Wright v. Campbell*. It has been argued at the bar, that it is impossible for the holder of a bill of lading to bring an action on it against the consignor: perhaps that argument is well founded: no special action on the bill of lading has ever been brought;* for if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is the proper form of action. If an action be brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered. Then it has been said that no case has yet decided that a bill of lading does transfer the property: but in answer to that it is to be observed, that all the cases upon the subject—*Evans v. Martlett*, *Wright v. Campbell*, and *Caldwell v. Ball*, and the universal understanding of mankind—preclude that question. The cases between the consignor and consignee have been founded merely on principles of equity, and have followed up the principle of *Snee v. Prescott*; for if a man has bought goods and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back again, if he can do it before they are in fact delivered. There is no weight in the argument of hardship on the vendor: at any rate that

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(a) Sittings
after Trin.
1785, at Guild-
hall, before
Lord Mans-
field, C. J.

(b) Hil. 25 G.
3.

* [See now,
as to the right
to sue by
statute, *post*,
in notā.]

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is a bad argument in a court of law ; but in fact there is no hardship on him, because he has parted with the legal title to the consignee. An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all : the answer is, that under those circumstances a bill of lading could not possibly exist, if the transaction were a fair one ; for a bill of lading is an acknowledgment by the captain, of having received the goods on board his ship : therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received goods on board ; and the consignee would be entitled to his action against the captain for the fraud. As the plaintiff in this case has paid a valuable consideration for the goods, and there is no colour for imputing fraud or notice to him, I am of opinion that he is entitled to the judgment of the Court.

Grose, J.

Grose, J.—After this case has been so elaborately spoken to by my brethren, it is not necessary for me to enter fully into the question, as I am of the same opinion with them. But I think that the importance of the subject requires me to state the general grounds of my opinion. I conceive this to be a mere question of law, whether, as between the vendor and the assignee of the vendee, the bill of lading transfers the property. I think that it does. With respect to the question as between the original consignor and consignee, it is now the clear, known, and established law that the consignor may seize the goods *in transitu*, if the consignee become insolvent before the delivery of them. But that was not always the law. The first case of that sort was that of *Wiseman v. Vandeputt* in Chancery (a), when, on the first hearing, the Chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignees ; and it was then determined in a court of law that it did ; but the Court of Equity thought it right to interpose and give relief : and since that time it has always been considered, as between the original parties,

(a) 2 Vern.
203.

that the consignor may seize the goods before they are actually delivered to the consignee in case of the insolvency of the consignee. But this is a question between the consignor and the assignee of the consignee, who do not stand in the same situation as the original parties. A bill of lading carries credit with it; the consignor by his indorsement gives credit to the bill of lading, and on the faith of that, money is advanced. The first case that I find where an attempt was made to introduce the same law between the consignor and the indorsee of the consignee, is that of *Snee v. Prescott*; but as my brother *Buller* has already made so many observations on that case, it would be but repetition in me to go over them again, as I entirely agree with him in them all, as well as in those which he made on the other cases. Therefore I am of opinion that there should be judgment for the plaintiff.

Judgment for the plaintiff (a).

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(a) This judgment was afterwards reversed in the Exchequer Chamber, *vide Mason v. Lickbarrow, infra*. But the record being afterwards removed into the House of Lords, a *venire de novo* was awarded in June, 1793, *vide post, p. 729, et seq.*

MASON AND OTHERS v. LICKBARROW AND OTHERS, IN
THE EXCHEQUER CHAMBER, IN ERROR.

The defendants in the original action, having brought a writ of error in the Exchequer Chamber, after two arguments, the following judgment of that court was then delivered by

Lord *Loughborough*.—This case comes before the court on a demurrer to the evidence; the general question, therefore, is, whether the facts offered in evidence by the plaintiffs in the action are sufficient to warrant a verdict in their favour?

The facts are shortly these: On the 22nd of July, 1786, Messrs. Turings shipped on board the ship *Endeavour*, of which Holmes was master, at *Middleburgh*, to be carried to *Liverpool*, a cargo of goods by the order and directions and on the account of Freeman, of *Rotterdam*, for which, of the same date, bills of lading were signed on behalf of the master, to deliver the goods at *Liverpool*, specified to be shipped by Turings to order or to assigns. On the same 22nd of July, two of the bills of lading, indorsed in

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Cam. Scacc.
Lord
Loughborough.

Held in Cam. Scacc. that where the consignee of goods becomes insolvent, the consignor may stop them *in transitu* before the consignee gains possession. In such cases also the consignor may stop the goods *in transitu*, though the consignee assign the bills of lading to a third person for a valuable consideration; the right of the consignor not being divested by the assignment. But this judgment was reversed, and the latter point is now settled otherwise.

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blank by Turings, were transmitted by them, together with an invoice of the goods, to Freeman at *Rotterdam*, and were duly received by him, that is, in the course of post, one of the bills being retained by Turings. I take no notice of there being four bills of lading, because on that circumstance I lay no stress. On the 25th of July, bills of exchange for a sum of 477*l.*, being the price of the goods, were drawn by Turings, and accepted by Freeman at *Rotterdam*; and Freeman on the same day transmitted to the plaintiffs in the action, merchants at *Liverpool*, the bills of lading and invoice, which he had received from Turings, in order that the goods might be sold by them on his account; and of the same date drew upon them bills to the amount of 520*l.*, which were duly accepted, and have since been paid by them; and for which they have never been reimbursed by Freeman, who became a bankrupt on the 15th of August following. The bills accepted by Freeman, for the price of the goods shipped by Turings, had not become due on the 15th of August, but on notice of his bankruptcy they sent the bill of lading which remained in their custody to the defendants at *Liverpool*, with a special indorsement to deliver to them and no other: which the defendants received on the 28th of August, 1786, together with the invoice of the goods and a power of attorney. The ship arrived at *Liverpool* on the 28th of August, and the goods were delivered by the master, on account of Turings, to the defendants, who, on demand and tender of freight, refused to deliver the same to the plaintiffs.

The defendants, in this case, are not stakeholders, but they are in effect the same as Turings, and the possession they have got is the possession of Turings. The plaintiffs claim under Freeman; but though they derive a title under him, they do not represent him, so as to be answerable for his engagements; nor are they affected by any notice of those circumstances which would bar the claim of him or of his assignees. If they have acquired a legal right, they have acquired it honestly; and if they have trusted to a bad title, they are innocent sufferers. The

question then is, whether the plaintiffs have a superior legal title to that right which, on principles of natural justice, the original owner of goods not paid for has to maintain that possession of them, which he actually holds at the time of the demand ?

The argument, on the part of the plaintiffs, asserts that the indorsement of the bill of lading by the Turings is an assignment of the property in the goods to Freeman, in the same manner as the indorsement of a bill of exchange is an assignment of the debt: that Freeman could assign over that property, and that by delivery of the bill of lading to the plaintiffs for a valuable consideration, they have a just right to the property conveyed by it, not affected by any claim of the Turings, of which they had no notice. On the part of the defendant it is argued, that the bill of lading is not in its nature a negotiable instrument; that it more resembles a *chose in action*; that the indorsement of it is not an assignment that conveys any interest, but a mere authority to the consignee to receive the goods mentioned in the bill; and therefore it cannot be made a security by the consignee for money advanced to him; but the person who accepted it must stand in the place of the consignee, and cannot gain a better title than he had to give. As these propositions on either side seem to be stated too loosely, and as it is of great importance that the nature of an instrument so frequent in commerce as a bill of lading should be clearly defined, I think it necessary to state my ideas of its nature and effect:—

A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment; 2 Lord Raym. 912. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board, the ship-master acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the

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goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods. When this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the shipmaster; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the shipmaster; and in this respect, I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the indorsee? a right to receive the goods and to discharge the shipmaster, as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or a factor. Mere possession, without a just title, gives no property; and the person to whom such possession is transferred by delivery, must take his hazard of the title of his author. The indorsement of a bill of lading differs from the assignment of a *chose in action*, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on ship-board, may all be assigned. The order to deliver is an assignment of the thing itself, which ought to be delivered on demand, and the right to sue if the demand is refused, is attached to the thing. The case in 1 Lord Raym. 271 was well determined on the principal point, that the consignee might maintain an action for the goods, because he had either a special property in them, or a right of action on the contract: and I assent to the *dictum*, that he might assign over his right. But the question remains, What right passes by the

first indorsement, or by the assignment of it? An assignment of goods in pawn, or of goods bought but not delivered, cannot transmit a right to take the one without redemption, and the other without the payment of the price. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange; which is the assignment of a debt due to the payee, and which, by the custom of trade, passes the whole interest in the debt so completely, that the holder of the bill for a valuable consideration without notice, is not affected even by the crime of the person from whom he received the bill.

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Bills of lading differ essentially from bills of exchange in another respect.

Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer of the debt which one person owes another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed to the true owner of the goods by the freighter, who acts merely as his servant. They may be indorsed to a factor to sell for the owner. They may be indorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do and sometimes do not express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom, if ever, bear upon the face of them any indication of the purpose of the indorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law is a strong argument that no general usage has made them negotiable as bills. Some evidence appears to have been given in other cases (*a*), that the received opinion of merchants was against their being so negotiable. And unless there was a clear, established, general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which

(*a*) *Snee v. Prescott*, 1 Atk. 245; *Fearon v. Bowers*, *post*.

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(a) 2 Str. 1187;
1 Wils. 8.

should first adopt such a law would lose its credit with the rest of the commercial world. For the immediate consequence would be to prefer the interest of the resident factors and their creditors, to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit, at the hazard and expense of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by indorsement must inquire under what title the bills have come to the hands of the person from whom he takes them. Is this more difficult than to inquire into the title by which goods are sold or assigned? In the case of (a) *Hartop v. Hoare*, jewels deposited with a goldsmith were pawned by him at a banker's. Was there any imputation, even of neglect, in a banker trusting to the apparent possession of jewels by a goldsmith? Yet they were the property of another, and the banker suffered the loss. It is received law, that a factor may sell, but cannot pawn, the goods of his consignor, *Patterson v. Tash*, 2 Str. 1178. The person, therefore, who took an assignment of goods from a factor in security, could not retain them against the claim of the consignor; and yet, in this case the factor might have sold them and embezzled the money. It has been argued, that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading. Is it then nothing, that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him; a title to the possession of the goods when they arrive. He has a safe security, if he has dealt with an honest man. And it seems as if it could be of little utility to trade, to extend credit by affording a facility to raise money by unfair dealing. Money will be raised on goods at sea, though bills of lading should not be negotiable, in every case where there is a fair ground of credit: but a man of

doubtful character will not find it so easy to raise money at the risk of others.

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The conclusions which follow from this reasoning, if it be just, are—1st. That an order to direct the delivery of goods indorsed on a bill of lading is not equivalent, nor even analogous, to the assignment of an order to pay money by the indorsement of a bill of exchange. 2ndly. That the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law; but, as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3rdly. That it is, therefore, not negotiable as a bill, but assignable; and passes such right, and no better, as the person assigning had in it.

This last proposition I confirm by the consideration, that actual delivery of the goods does not of itself transfer an absolute ownership in them, without a title of property; and that the indorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer, that the mere indorsement can in no case convey an absolute property. It may, however, be said, that admitting an indorsement of a bill of lading does not in all cases import a transfer of the property of the goods consigned, yet where the goods, when delivered, would belong to the indorsee of the bill, and the indorsement accompanies a title of property, it ought in law to bind the consignor, at least with respect to the interest of third parties. This argument has, I confess, a very specious appearance. The whole difficulty of the case rests upon it; and I am not surprised at the impression it has made, having long felt the force of it myself. A fair trader, it is said, is deceived by the misplaced confidence of the consignor. The purchaser sees a title to the delivery of the goods placed in the hands of the man who offers them to sale. Goods not arrived are every day sold without any suspicion of distress, on speculations of the fairest nature. The purchaser places no credit in the consignee, but in the indorsement produced to him, which is the act

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(a) See Hob.
41, and the
year-book there
cited.

† [See *Martin-
dale v. Smith*,
1 Q. B. 389.]

of the consignor. The first consideration which affects this argument is, that it proves too much, and is inconsistent with the admission. But let us examine what the legal right of the vendor is, and whether, with respect to him, the assignee of a bill of lading stands on a better ground than the consignee from whom he received it. I state it to be a clear proposition, that the vendor of goods not paid for may retain the possession against the vendee; not by aid of any equity, but on grounds of law. Our oldest books (a) consider the payment of the price (day not being given†) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them, without tender of the price. If day had been given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he had brought an action on the contract, for the non-delivery. *Snee v. Prescott*, 1 Atk. 245. The sale is not executed before delivery: and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant was always supposed. In the variety and extent of dealing which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*. The cases determined in our courts of law have confirmed this doctrine, and the same law obtains in other countries.

In an action tried before me at *Guildhall*, after the last Trinity Term, it appeared in evidence, that one Bowering had bought a cask of Indigo of Verrulez and

Co. at *Amsterdam*, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out, and signed by Tulloh, to deliver to Bowering or order, who immediately indorsed one of them to his correspondent in *London*, and sent it by the post. Verrulez, having information of Bowering's insolvency before the ship sailed from the *Texel*, summoned Tulloh the ship-master before the court at *Amsterdam*, who ordered him to sign other bills of lading, to the order of Verrulez. Upon the arrival of the ship in *London*, the ship-master delivered the goods, according to the last bills, to the order of Verrulez. This case, as to the practice of merchants, deserves particular attention, for the judges of the court at *Amsterdam* are merchants, of the most extensive dealings, and they are assisted by very eminent lawyers. The cases in our law, which I have taken some pains to collect and examine, are very clear upon this point. *Snee v. Prescott*, though in a court of equity, is professedly determined on legal grounds by Lord *Hardwicke*, who was well versed in the principles of law; and it is an authority, not only in support of the right of the owner unpaid to retain against the consignee, but against those claiming under the consignee by assignment for valuable consideration, and without notice. But the case of *Fearon v. Bowers* (a), tried before Lord Chief Justice

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(a) *Fearon v. Bowers*, *Guildhall*, March 28, 1753, *coram Lee, C. J.*

Detinue against the master or captain of a ship. On the general issue pleaded, the case appeared to be, that one Hull, of *Salisbury*, had written to Askell and Co., merchants at *Malaya*, to send him 20 butts of olive oil, which Askell accordingly bought, and shipped on board the ship *Tavistock*, of which the defendant was commander, who signed three bills of lading acknowledging the receipt of the goods, to be delivered to the order of

the shipper. In the bills was the usual clause—that one being performed, the other two should be void.

The goods being thus shipped, Askell sent an invoice thereof, and also one of the bills of lading, to Hall, indorsed by Askell, to deliver the contents to Hall; and Askell at the same time sent to Jones, his partner in *England*, a bill of exchange drawn on Hall for the amount of the price of the oil; and also another of the bills of lading indorsed by Askell to deliver the contents to Jones. The bill of exchange was presented to Hall, but not being paid by him it was returned protested; whereupon Jones, on the 1st of September, 1752 (a day or two after the ship arrived), applied to the defendant to deliver the oils to him, and having produced his bill of lading, the defendant promised to deliver them accordingly. But the ship not being reported to the custom-house, the oils could not be then delivered; and before they were delivered, the plaintiff, on the 3rd of September, produced the bill of lading sent to Hall, with an indorsement thereon by Hall to deliver the contents to the plaintiff, and also the invoice, upon the credit of which he had advanced to Hall 200*l.*—Notwithstanding this, the defendant afterwards delivered the oils to Jones, and took his receipt for them on the back of the bill of lading.

For the plaintiff it was contended, that the bill of lading indorsed to Hall, and by him to the plaintiff, had fixed the property of the goods in the plaintiff. That the consignee of a bill of lading has such a property that he may assign it over; *Evans v. Martlett*, 1 Lord Raym. 271. There it is laid down, if goods are by bill of lading consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost: but if the bill be special to deliver to A. for the use of B., B. ought to bring the action; but if the bill be general, and the invoice only shows they are upon the account of B., A. ought to bring the action, for the pro-

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(a) Assignees
of *Burghall*, a
bankrupt, v.
Howard.

At Guildhall
sittings after
Hil. 32, G. 2,
coram Lord
Mansfield.

One *Burghall* at
London gave
an order to
Bromley at
Liverpool to
send him a
quantity of
cheese. *Bromley*
accordingly
shipped a ton
of cheese on
board a ship

there, whereof *Howard*, the defendant, was master, who signed a bill of lading to deliver it in good condition to *Burghall* in *London*. The ship arrived in the *Thames*, but *Burghall* having become a bankrupt, the defendant was ordered, on behalf of *Bromley*, not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as carrier.

Lord *Mansfield* was of opinion that the plaintiffs had no foundation to recover; and said he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property.

The plaintiffs were nonsuited.

property is in him, and B. has only a trust; *per totam curiam*. *Holt*, C. J., said the consignee of a bill of lading has such a property that he may assign it over; and *Shower* said, it had been adjudged so in the Exchequer. It has been further insisted, that the plaintiff had advanced the 200*l.* on the credit of the bill of lading, in the course of trade, and no objection was made that the bills had not been paid for; for that would prove too much, namely, that the bill of lading was not negotiable. And the indorsement was compared to the indorsement of a bill of exchange, which is good, though the bill originally was obtained by fraud. Merchants were examined on both sides, and seemed to agree that the indorsement of a bill of lading vests the property; but that the original consignor, if not paid for the goods, had a right, by any means that he could, to stop their coming to the hands of the consignee till paid for. One of the witnesses said, he had a like case before the Chancellor, who upon that occasion said, he thought the consignor had a right to get the goods in such a case back into his hands in any way, so as he did not steal them.

It also appeared by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain, and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper; that he was discharged by a delivery to either with a receipt on the bill of lading, and was not obliged to look into the invoice or consider the merits of the different claims.

Lee, C. J., in summing up the evidence, said that, to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement: that the invoice strengthens that right by showing a farther intention to transfer the property. But it appeared in this case, that *Jones* had the other bill of lading to be as a curb on *Hall*, who in fact had never paid for the goods. And it appeared by the evidence, that, according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury therefore were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did. [Accord, as to discharge of the master by delivery under either bill, *The Tigress*, Brown & Lushington, Adm. Ca. 38; 32 L. J. Adm. 97 S.C.]

tain that the right of the consignor is not a perfect legal right in the thing itself, but that it is only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith, and unconscionable. If the consignor had no legal title, the question between him and the *bonâ fide* purchaser from the consignee would turn on very nice considerations of equity. But a legal lien, as well as a right of property, precludes these considerations; and the admitted right of the consignor to stop the goods *in transitu* as against the consignee, can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods till the price is paid, as a pledge for the price. It has been asserted in the course of the argument, that the right of the consignor has by judicial determinations been treated as a mere equitable claim in cases between him and the consignee. To examine the force of this assertion, it is necessary to take a review of the several determinations.

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The first is the case of *Wright v. Campbell*, 4 Burr. 2046, on which the chief stress is laid. The first observation that occurs upon that case is, that nothing was determined by it. A case was reserved by the judge at *Nisi Prius*, on the argument of which the Court thought the facts imperfectly stated, and directed a new trial. That case cannot therefore be urged as a decision upon the point. But it is quoted as containing in the report of it an opinion of Lord *Mansfield*, that the right of the consignor to stop the goods cannot be set up against a third person claiming under an indorsement for value and without notice. The authority of such an opinion, though no decision had followed upon it, would deservedly be very great, from the high respect due to the experience and wisdom of so great a judge. But I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord *Mansfield* is there speaking of the consignment of goods to a factor to sell for the owner; and he very truly observes,

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Campbell.

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(a) *Ante*, p.
702.

(b) *Ante*, p.
713.

(c) 1 Term
Rep. B. R. 205.

(d) 1 Term
Rep. B. R. 745.

1st, that as against the factor, the owner may retain the goods; 2ndly, that a person into whose hands the factor has passed the consignment with notice, is exactly in the same situation with the factor himself; 3rdly, that a *bond fide* purchaser from the factor shall have a right to the delivery of the goods, because they were sold *bond fide*, and by the owner's own authority. If the owner of the goods entrust another to sell them for him, and to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally, if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods, can never occur where the factor has acted strictly according to the orders of his principal, and where, consequently, he has bound him by his contract. There would be no possible ground for argument in the case now before the court, if the plaintiffs in the action could maintain, that Turings & Co. had sold to them by the intervention of Freeman, and were therefore bound *ex contractu* to deliver the goods. Lord *Mansfield's* opinion upon the direct question of the right of the consignor to stop the goods against a third party, who has obtained an indorsement of the bill of lading, is quoted in favour of the consignor, as delivered in two cases at *Nisi Prius* (a); *Savignac v. Cuff* in 1778, and (b) *Stokes v. La Riviere* in 1785. Observations are made on these cases, that they were governed by particular circumstances; and undoubtedly when there is not an accurate and agreed state of them, no great stress can be laid on the authority. The case of (c) *Caldwell v. Ball* is improperly quoted on the part of the plaintiffs in the action, because the question there was on the priority of consignments, and the right of the consignor did not come under consideration. The case of (d) *Hibbert v. Carter* was also cited on the same side, not as having decided any question upon the consignor's right to stop the goods, but as establishing a position that by the indorsement of the bill of lading, the property was so completely transferred to the indorsee, that the shipper of the goods had

no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and, undoubtedly, if the fact had been as it was at first supposed, that the cargo had been accepted in payment of the debt, the conclusion would have been just: for the property of the goods, and the risk, would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading, the goods remaining at the risk of the shipper, transfers the property so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the *West Indies*, and all countries where the balance of trade is in favour of *England*, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expense of insurance, freight, duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. The case, therefore, has no application to the present question. And from all the cases that have been collected, it does not appear that there has ever been a decision against the legal right of the consignor to stop the goods *in transitu*, before the case now brought before this court. When a point in law which is of general concern in the daily business of the world is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion upon loose reports of incidental arguments. The rule, therefore, which the court is to lay down in this case, will have the effect, not to disturb, but to settle, the notions of the commercial part of this country, on a point of very great importance, as it regards the security and good faith of their transactions. For these reasons we think the judgment of the Court of King's Bench ought to be reversed.

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The following account of the further proceedings in this case is given by Mr. East, in a note to his Reports, Vol. 2, p. 19.

Account of the proceedings in the case.

This case first came on upon a demurrer to evidence, on which there was judgment for the plaintiff; this court holding, that though the vendor of goods might, as between himself and the vendee, stop them *in transitu* to the latter, in case of his insolvency, not having paid for them; yet that if the vendee, having in his possession the bill of lading indorsed in blank by the vendor, before such stopping *in transitu*, indorse and deliver it to a third person for a valuable consideration and without notice of the non-payment, the right of the vendor to stop in *transitu* is thereby divested as against such *bonâ fide* holder of the bill. This judgment was reversed upon a writ of error in the Exchequer Chamber, where it was considered that a bill of lading was not a negotiable instrument, the indorsement of which passed the property *proprio vigore*, like the indorsement of a bill of exchange; though to some purposes it was assignable by indorsement, so as to operate as a discharge to the captain who made a delivery *bonâ fide* to the assignee. 1 H. Black. 357. The latter judgment was in its turn reversed in the House of Lords in T. 33 Geo. 3, and a *venire facias de novo* directed to be awarded by B. R. 5 Term Rep. 367, and 2 H. Black. 211. The ground of that reversal was, that the demurrer to evidence appeared to be informal on the record MS. The very elaborate opinion delivered by Mr. Justice *Buller*, upon the principal question before the House, a copy of which he afterwards permitted me to take, I shall here subjoin, as it contains the most comprehensive view of the whole of this subject which is anywhere to be found. A *venire facias de novo* having been accordingly awarded by B. R., a special verdict was found upon the second trial, containing in substance the same facts as before; with this addition, that the jury found, *that by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are, after the ship-*

The ground of the reversal of the judgment of the Court of Exch. Cha. was an informality.

ment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, or transmitting of the same to any other person; and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person. And that by the custom of merchants, indorsements of bills of lading in blank may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of the goods to be made to such person: and according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been done by the shipper. On this special verdict, the court of B. R., understanding that the case was to be carried up to the House of Lords, declined entering into a discussion of it; merely saying, that they still retained the opinion delivered upon the former case, and gave judgment for the plaintiffs. 5 Term Rep. 683.

Account of the proceedings in the case.

LICKBARROW AND ANOTHER v. MASON AND OTHERS, IN ERROR.—DOM. PROC. 1793.

Buller, J.—Before I consider what is the law arising on this case, I shall endeavour to ascertain what the case itself is. It appears that the two bills of lading were indorsed in blank by Turing, and sent so indorsed in the same state by Freeman to the plaintiffs, in order that the goods might, on their arrival at *Liverpool*, be taken possession of, and sold by the plaintiffs, on Freeman's account. I shall first consider what is the effect of a blank indorsement; and secondly, I will examine whether the words, "to be so sold by the plaintiffs on Freeman's account," make any difference in the case. As to the first, I am of opinion that a blank indorsement has precisely the same effect that an indorsement to deliver to the plaintiffs would have. In the case of bills of exchange, the effect of a blank indorsement is too universally known to be doubted; and, therefore, on that head I shall only mention the case of *Russell v. Langstaffe*, Dougl. 496, where a man indorsed his name on copper-plate checks,

Opinion of *Buller, J.*, in Dom. Proc.

Opinion of
Buller, J., in
Dom. Proc.

made in the form of promissory notes, but in blank, *i. e.*, without any sum, date, or time of payment : and the court held, that the indorsement on a blank note is a letter of credit for an indefinite sum ; and the defendant was liable for the sum afterwards inserted in the note, whatever it might be. In the case of bills of lading, it has been admitted at your lordships' bar, and was so in the Court of King's Bench, that a blank indorsement has the same effect as an indorsement filled up to deliver to a

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particular person by name. In the case of *Snee v. Prescott*, Lord *Hardwicke* thought that there was a distinction between a bill of lading indorsed in blank, and one that was filled up ; and upon that ground part of his decree was founded. But that I conceive to be a clear mistake. And it appears from the case of *Savignac v. Cuff*, (of which case I know nothing but from what has been quoted by the counsel, and that case having occurred before the

(a) Lord *Mansfield's* papers were then burnt, together with his house, in the riots of that period.

unfortunate year 1780 (a), no further account can be obtained), that though Lord *Mansfield* at first thought that there was a distinction between bills of lading indorsed in blank and otherwise, yet he afterwards abandoned that ground. In *Solomons v. Nyssen*, Mich. 1788, 2 Term Rep. 674, the bill of lading was to order or assigns, and the indorsement in blank ; but the court held it to be clear that the property passed. He who delivers a bill of lading indorsed in blank to another, not only puts it in the power of the person to whom it is delivered, but gives him authority to fill it up as he pleases ; and it has the same effect as if it were filled up with an order to deliver to him. The next point to be considered is, what difference do the words "to be sold by the plaintiffs on Freeman's account" make in the present case ? It has been argued that they prove the plaintiffs to be factors only. But it is to be observed that these words are not found in the bill of lading itself : and, therefore, they cannot alter the nature and construction of it. I say they were not in the bill of lading itself ; for it is expressly stated that the bill of lading was sent by Freeman in the same state in which it was

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received, and in that there is no restriction or qualification whatever; but it appeared by some other evidence—I suppose by some letter of advice, that the goods were so sent, to be sold by the plaintiffs on Freeman's account. Supposing that the plaintiffs are to be considered as factors, yet if the bill of lading, as I shall contend presently, passes the legal property in the goods, the circumstance of the plaintiffs being liable to render an account to Freeman for those goods afterwards, will not put Turing in a better condition in this cause; for a factor has not only a right to keep goods till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general account.† The truth of the case, as I consider it, is, that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them, and pay themselves the 520*l.* advanced in bills out of the produce, and so be accountable to Freeman for the remainder, if there were any. But if the goods had not sold for so much as 510*l.*, Freeman would still have remained debtor to the plaintiffs for the difference; and so far only they were sold on Freeman's account. But I hold that a factor who has the legal property in goods can never have that property taken from him, till he is paid the uttermost farthing which is due to him. *Kruger v. Wilcocks*, Ambl. 252.

This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as any questions which ever can arise. The first is, whether at law the property of goods at sea passes by the indorsement of a bill of lading? The second, whether the defendant, who stands in the place of the original owner, had a right to stop the goods *in transitu*? And as to the first, every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee. In 1690 it was so decided in the case of *Wiseman v. Vandeputt*, 2 Vern. 203.

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† Acc. *Houghton v. Matthews*, 3 B. & P. 488; *Mann v. Shifner*, 2 East, 529; *Hudson v. Grainger*, 5 B. & Ad. 27; *Drinkwater Goodwin*. Cowp. 251.

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In 1697, the court determined again in *Evans v. Martlett* that the property passes by the bill of lading. That case is reported in 1 Lord Raym. 271, and in 12 Mod. 156; and both books agree in the points decided. Lord *Raymond* states it to be, that if goods by a bill of lading are consigned to A., A. is the owner, and must bring the action: but if the bill be special to be delivered to A., to the use of B., B. ought to bring the action: but if the bill be general to A., and the *invoice* only shows that they are on account of B. (which I take to be the present case), A. ought always to bring the action; for the property is in him, and B. has only a trust. And *Holt, C. J.*, says the consignee of a bill of lading has such a property as that he may assign it over; and Shower said it had been so adjudged in the Exchequer. In 12 Mod. it is said that the court held that the invoice signified nothing;* but that the consignment in a bill of lading gives the property, except where it is for the account of another; that is, where on the face of the bill it imports to be for another. In *Wright v. Campbell*, in 1767 (4 Burr. 2046), Lord *Mansfield* said, "If the goods are *bonâ fide* sold by the factor at sea (as they may be where no other delivery can be given) it will be good notwithstanding the stat. 21 Jac. 1. The vendee shall hold them by virtue of the bill of sale, though no actual possession be delivered; and the owner can never dispute with the vendee, because the goods were sold *bonâ fide*, and by the owner's own authority." His lordship added (though that is not stated in the printed report) that the doctrine in Lord *Raymond* was right, that the property of goods at sea was transferable. In *Fearon v. Bowers*,† in 1753, Lord Chief Justice *Lee* held that a bill of lading transferred the property, and a right to assign that property by indorsement; but that the captain was discharged by a delivery under either bill. In *Snee v. Prescott*, in 1743, (1 Atk. 245,) Lord *Hardwicke* says, "Where a factor, by the order of his principal, buys goods with his own money, and makes the bill of lading absolutely in the principal's name, to have the goods delivered to the prin-

* [Invoice delivered by a tradesman naming him as seller no estoppel against his showing he was not; *Holding v. Elliott*, 5 H. & N. 117; 29 L. J. Exch. 134.]

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† [Accord, *The Tigress*, Brown & Lushington's Adm. Ca. 38; 32 L. J. Adm. 97, S. C.]

cipal, in such case the factor cannot countermand the bill of lading ; but it passes the property of the goods fully and irrevocably to the principal." Then he distinguishes the case of blank indorsement, in which he was clearly

- wrong. He admits, too, that if upon a bill of lading between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee. In *Caldwell v. Bull*, in 1786, (1 Term Rep. 205,) the court held that the indorsement of the bill of lading was an immediate transfer of the legal interest in the cargo. In *Hibbert v. Carter*, in 1787, (1 Term Rep. 745,) the court held again that the indorsement and delivery of the bill of lading to a creditor *prima facie* conveyed the whole property in the goods from the time of its delivery. The case of *Godfrey v. Furzo*, 3 P. Wms. 185, was quoted on behalf of the defendant.

A merchant at *Bilboa* sent goods from thence to B., a merchant in *London*, for the use of B., and drew bills on B. for the money. The goods arrived in *London*, which B. received, but did not pay the money, and died insolvent. The merchant beyond sea brought his bill against the executors of the merchant in *London*, praying that the goods might be accounted for to him, and insisted that he had a lien on them till paid. Lord Chancellor says,—“When a merchant beyond sea consigns goods to a merchant in *London* on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in *London*, who is credited for them, and consequently they are liable to his debts. But where a merchant beyond sea consigns goods to a factor in *London*, who receives them, the factor in this case, being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy.” The whole of this case is clear law ; but it makes for the plaintiffs and not the defendants. The first point is this very case ; for the bill of lading here is generally to the plaintiffs, and therefore on their account ;

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and in such case, though the money be not paid, the property vests in the consignee. And this is so laid down without regard to the question, whether the goods were received by the consignee or not. The next point there stated is, what is the law in the case of a pure factor, without any demand of his own? Lord *King* says he would have no property. This expression is used as between consignor and consignee, and obviously means no more than that, in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord *King* is, because in this case the factor is only a servant or agent for the merchant beyond sea. I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property. But then it remains to be proved that a man who is in advance; or under acceptances on account of the goods, is simply and merely a servant or agent; for which no authority has been, or, as I believe, can be produced. Here the bills were drawn by Freeman upon the plaintiffs upon the same day, and at the same time, as he sent the goods to them; and therefore this must, by fair and necessary intendment, be taken to be one entire transaction; and that the bills were drawn on account of the goods, unless the contrary appear.—So far from the contrary appearing here, when it was thought proper to allege on this demurrer that the price of the goods was not paid, it is expressly so stated; for the demurrer says, that the price of the goods is now due to Turing and Son. But it finds that the other bills were afterwards paid by the plaintiffs; and consequently they have paid for the goods in question. As between the principal and mere factor, who has neither advanced nor engaged in anything for his principal, the principal has a right at all times to take back his goods at will: whether they be actually in the factor's possession, or only on their passage, makes no difference; the principal may countermand his order: and though the property remain in the factor till such countermand, yet from that moment the property reverts in the principal, and he may maintain *trover*. But in the

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present case the plaintiffs are not that mere agent or servant; they have advanced 510*l.*, on the credit of those goods, which at a rising market were worth only 557*l.*; and they have beside, as I conceive, the legal property in the goods under the bill of lading. But it was contended at the bar, that the property never passed out of Turing; and to prove it, Hob. 41 was cited. In answer to this I must beg leave to say, that the position in Hobart does not apply; because there no day of payment was given; it was a bargain for ready money; but here a month was given for payment. And in Noy's Maxims, 87, this is laid down: "If a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not a day expressly given to him to pay for them." *Thorpe v. Thorpe*, Rep. temp. Holt, 96, and *Brice v. James*, Rep. temp. Lord Mansfield, S. P. So Dy. 30 and 76. And in Shep. Touch. 222, it is laid down, that "If one sell me a horse, or anything for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, it is a good bargain and sale to alter the property thereof; and I may have an action for the thing, and the seller for his money." Thus stand the authorities on the point of legal property; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster-hall, that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment, nor even a dictum, if properly understood, which impeaches this long string of cases. On the contrary, if any argument can be drawn by analogy from older cases on the vesting of property, they all tend to the same conclusion. If these cases be law, and if the legal property be vested in the plaintiffs, that, as it seems to me, puts a total end to the present case; for then it will be incumbent on the defendants to show that they have superior equity which bears down the letter of the law; and which entitles them to retain the goods against the legal right of the plaintiffs, or they

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have no case at all. I find myself justified in saying that the legal title, if in the plaintiffs, must decide this cause by the very words of the judgment now appealed against; for the noble lord who pronounced that judgment, emphatically observed in it, "that the plaintiffs claim under Freeman; but though they derive a title under him, they do not represent him, so as to be answerable for his engagements; nor are they affected by any notice of those circumstances which would bar the claims of him or his assignees." This doctrine, to which I fully subscribe, seems to me to be a clear answer to any supposed lien which Turing may have on the goods in question for the original price of them.

But the second question made in the case is, that however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods *in transitu*, and have a lien for the original price of them. Before I consider the authorities applicable to this part of the case, I will beg leave to make a few observations on the right of stopping goods *in transitu*, and on the nature and principle of liens. 1st, Neither of them are founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights.* They are qualified rights, which in given cases may be exercised over the property of another: and it is a contradiction in terms to say a man has a lien upon his own goods, or right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them whether they be *in transitu*, or not: he has a right to sell or dispose of them as he pleases, without the option of any other person: but he who has a lien only on goods, has no right so to do; he can only retain them till the original price be paid: and therefore if goods are sold for 500*l.*, and by a change of the market, before they are delivered, they become next day worth 1000*l.*, the vendor can only retain them till the 500*l.* be paid, unless the bargain be absolutely rescinded by the vendee's refusing to pay the 500*l.*—2ndly, Liens at law exist only in cases

* See the distinction drawn by Bayley, J., between the right of possession and that of property, *post*, in *notis*.

where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone.†—3rdly, *The right of stopping in transitu is founded wholly on equitable principles, which have been adopted in courts of law*; and as far as they have been adopted, I agree they will bind at law as well as in equity. So late as the year 1690, this right, or privilege, or whatever it may be called, was unknown to the law. The first of these propositions is self-evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a tailor, or an inn-keeper, deliver up the goods, his lien is gone. So also is the case of a factor as to the particular goods: but, by the general usage in trade, he may retain for the balance of his account all goods in his hands, without regard to the time when or on what account he received them. In *Snee v. Prescott*, Lord *Hardwicke* says that which not only applies to the case of liens, but to the right of stopping goods *in transitu* under circumstances similar to the case in judgment: for he says, where goods have been negotiated, and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price; for then no dealer would know when he purchased goods safely. So in *Lempriere v. Pasley*, (2 Term R. 485,) the court said it would be a great inconvenience to commerce if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned till they actually arrived in port. There are other cases which in my judgment apply as strongly against the right of seizing *in transitu* to the extent contended for by the defendants: but before I go into them, with your lordships' permission, I will state shortly the facts of the case of *Snee v. Prescott*, with a few more observations upon it. The doctrine of stopping *in transitu* owes its origin to courts of equity; and it is very material to observe that in that case, as well as many others which have followed it at law, the question is not as the counsel for the defendants would make it, whether

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† See *Lery v. Barnard*,
8 Taunt. 149.
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the property vested under the bill of lading? for that was considered as being clear: but whether, on the insolvency of the consignee, who had not paid for the goods, the consignor could countermand the consignment? or, in other words, divest the property which was vested in the consignee? *Snee and Baxter*, assignees of John Tollet, v. *Prescot* and others, 1 Atk. 245. Tollet, a merchant in *London*, shipped to Ragueneau and Co., his factors at *Leghorn*, serges to sell, and to buy double the value in silks; for which the factors were to pay half in ready money of their own, which Tollet would repay by bills drawn on him. The silks were bought accordingly, and shipped on board Dawson's ship, marked T; Dawson signed three bills of lading, to deliver at *London* to factors' consignors, or their order. The factors indorsed one bill of lading in blank, and sent it to Tollet, who filled up the same and pawned it. The bills drawn by the factors on Tollet were not paid, and Tollet became a bankrupt. The factors sent another bill of lading, properly indorsed, to *Prescot*, who offered to pay the pawnee, but he refused to deliver up the bill of lading; on which *Prescot* got possession of the goods from Dawson, under the last bill of lading. The assignees of Tollet brought the bill to redeem by paying the pawnee out of the money arising by sale, and to have the rest of the produce paid to them: and that the factors, although in possession of the goods, should be considered as general creditors only, and be driven to come in under the commission. Decreed, 1st, That the factors should be paid; 2nd, the pawnees; and 3rd, the surplus to the assignees. The decree was just and right in saying that the consignor, who never had been paid for the goods, and the pawnees, who had advanced money upon the goods, should both be paid out of the goods before the consignee or his assignees should derive any benefit from them. That was the whole of the decree; and if the circumstance of the consignor's interest being first provided for, be thought to have any weight, I answer, 1st, That such provision was founded on what is now admitted to be an apparent mistake of

the law, in supposing that there was a difference between a full and a blank indorsement. Lord *Hardwicke* considered the legal property in that case to remain in the consignor, and, therefore, gave him the preference. 2ndly, That whatever might be the law, the mere fact of the consignor's being in possession was a sufficient reason for a court of equity to say, We will not take the possession from you till you have been paid what is due to you for the goods. Lord *Hardwicke* expressly said—"This court will not say, as the factors have re-seized the goods, that they shall be taken out of their hands till payment of the half-price which they have laid down upon them. *He who seeks equity must do equity*; and, if he will not, he must not expect relief from a court of equity. It is in vain for a man to say in that court, I have the law with me, unless he will show that he has equity with him also. If he mean to rely on the law of his case, he must go to a court of law; and so a court of equity will always tell him under those circumstances." The case of *Snee v. Prescott* is miserably reported in the printed book: and it was the misfortune of Lord *Hardwicke*, and of the public in general, to have many of his determinations published in an incorrect and slovenly way: and, perhaps, even he himself, by being very diffuse, has laid a foundation for doubts which otherwise would never have existed. I have quoted that case from a MS. note taken, as I collect, by Mr. *John Cox*, who was counsel in the cause: and it seems to me that, on taking the whole of the case together, it is apparent that, whatever might have been said on the law of the case in a most elaborate opinion, Lord *Hardwicke* decided on the equity alone, arising out of all the particular circumstances of it, without meaning to settle the principles of law on which the present case depends. In one part of his judgment he says, that in strictness of law, the property vested in Tollet at the time of the purchase: "but, however that may be," says he, "this court will not compel the factors to deliver the goods without being disbursed what they have laid out." He begins by saying, "the demand is as harsh as can possibly come

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(a) Eyre, then
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into a court of equity." And in another part of his judgment he says, "Suppose the legal property in these goods was vested in the bankrupt, and that the assignees had recovered, yet this court would not suffer them to take out execution for the whole value, but would oblige them to account." But further, as to the right of seizing or stopping the goods *in transitu*, I hold that no man who has not equity on his side can have that right. I will say with confidence, that no case or authority, till the present judgment, can be produced to show that he has. But, on the other hand, in a very able judgment delivered by my brother *Ashurst*, in the case of *Lenpriere v. Pasley*, in 1788, 2 Term Rep. 485, he laid it down as a clear principle, that, as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. This is founded on plain and obvious reason: for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him has equity in his favour; and if he have law and equity both with him, he cannot be beat by a man who has equal equity only. Again, in a very solemn opinion, delivered in this house by the learned and respectable judge (a), who has often had the honour of delivering the sentiments of the judges to your lordships, when you are pleased to require it, so lately as the 14th of May, 1790, in the case of *Kinloch v. Craig*, 3 Term Rep. 787, it was laid down that the right of stopping goods *in transitu* never occurred but as between vendor and vendee; for that he relied on the case of *Wright v. Campbell*, 4 Burr. 2050. Nothing remains in order to make that case a direct and conclusive authority for the present, but to show that it is not the case of vendor and vendee. The terms vendor and vendee necessarily mean the two parties to a particular contract: those who deal together, and between whom there is privity in the disposition of the things about which we are talking. If A. sell a horse to B., and afterwards sell him

to C., and C. to D., and so on through the alphabet, each man who buys the horse is at the time of buying him a vendee; but it would be strange to speak of A. and D. together as vendor and vendee, for A. never sold to D., nor did D. ever buy of A. These terms are correlatives, and never have been applied, nor ever can be applied, in any other sense than to the persons who bought and sold to each other. The defendants, or Turing, in whose behalf and under whose name and authority they have acted, never sold these goods to the plaintiffs; the plaintiffs never were the vendees of either of them. Neither do the plaintiffs (if I may be permitted to repeat again the forcible words of the noble judge who pronounced the judgment in question,) represent Freeman so as to be answerable for his engagements, or stand affected by any notice of those circumstances which would bar the claim of Freeman or his assignees. These reasons, which I could not have expressed with equal clearness, without recurring to the words of the two great authorities by whom they were used, and to whom I always bow with reverence, in my humble judgment put an end to all questions about the right of seizing *in transitu*. Two other cases were mentioned at the bar which deserve some attention. One is the case of the assignees of *Burghall v. Howard* (a), before Lord *Mansfield* at *Guildhall*, in 1759; where the only point decided by Lord *Mansfield* was, that if a consignee become a bankrupt, and no part of the price of the goods be paid, the consignor may seize the goods before they come to the hands of the consignee or his assignees. This was most clearly right; but it does not apply to the present case; for when he made use of the word assignees, he undoubtedly meant assignees under a commission of bankruptcy, like those who were then before him, and not persons to whom the consignee sold the goods; for in that case it is stated that no part of the price of the goods was paid. The whole cause turns upon this point. In that case no part of the price of the goods was paid, and therefore the original owner might seize the goods. But in this case

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the plaintiffs had paid the price of the goods, or were under acceptances for them, which is the same thing; and therefore the original owner could not seize them again. But the note of that case says, Lord *Mansfield* added, "and this was ruled, not upon principles of equity only, but the laws of property." Do these words fairly import that the property was not altered by a bill of lading, or by the indorsement of it? That the liberty of stopping goods *in transitu* is originally founded on principles of equity, and that it has, in the case before him, been adopted by the law, and that it does affect property, are all true: and that is all that the words mean; not that the property did not pass by the bill of lading. The commercial law of this country was never better understood, or more correctly administered, than by that great man. It was under his fostering hand that the trade and the commercial law of this country grew to its present amazing size: and when we find him in other instances adopting the language and opinion of Lord Chief Justice *Holt*, and saying, that since the cases before him it had always been held, that the delivery of a bill of lading transferred the property at law, and in the year 1767 deciding that very point, it does seem to me to be absolutely impossible to make a doubt of what was his opinion and meaning. All his determinations on the subject are uniform. Even the case of *Savignac v. Cuff* (a), of which we have no account besides the loose and inaccurate note produced at the bar, as I understand it, goes upon the same principle. The note states that the counsel for the plaintiff relied on the property passing by the bill of lading; to which Lord *Mansfield* answered, the plaintiff had lost his lien, he standing in the place of the consignee. Lord *Mansfield* did not answer mercantile questions so; which, as stated, was no answer to the question made. But I think enough appears on that case to show the grounds of the decision, to make it consistent with the case of *Wright v. Campbell*, and to prove it a material authority for the plaintiffs in this case. I collect from it that the plaintiff had notice by the letter of advice, that *Lingham* had not

(a) Cited in
 2 Term Rep.
 66.

paid for the goods ; and if so, then, according to the case of *Wright v. Campbell*, he could only stand in Lingham's place. But the necessity of recurring to the question of notice strongly proves, that, if there had been no such notice, the plaintiff, who was the assignee of Lingham the consignee, would not have stood in Lingham's place, and the consignor could not have seized the goods *in transitu* : but that, having seized them, the plaintiff would have been entitled to recover the full value of them from him. This way of considering it makes that case a direct authority in point for the plaintiffs. There is another circumstance in that case material for consideration ; because it shows how far only the right of seizing *in transitu* extends, as between the consignor and consignee. The plaintiff in that action was considered as the consignee ; the defendant, the consignor, had not received the full value for his goods ; but the consignee had paid 150*l.* on account of them. Upon the insolvency of the consignee, the consignor seized the goods *in transitu* ; but that was holden not to be justifiable, and therefore there was a verdict against him. That was an action of *trover*, which could not have been sustained but on the ground that the property was vested in the consignee, and could not be seized *in transitu* as against him. If the legal property had remained in the consignor, what objection could be stated in a court of law to the consignor's taking his own goods ? But it was holden that he could not seize the goods ; which could only be on the ground contended for by Mr. Wallace, the counsel for the plaintiff, that the property was in the consignee : but though the property were in the consignee, yet, as I stated to your lordships in the outset, if the consignor had paid to the consignee all that he had advanced on account of the goods, the consignor would have had a right to the possession of the goods, even though they had got into the hands of the consignee ; and upon paying or tendering that money, and demanding the goods, the property would have reverted in him, and he might have maintained *trover* for them : but admitting that the

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consignee had the legal property, and was therefore entitled to a verdict, still the question remained what damages he should recover; and in ascertaining them, regard was had to the true merits of the case, and the relative situation of each party. If the consignee had obtained the actual possession of the goods, he would have had no other equitable claim on them than for 150%. He was entitled to no more, the defendant was liable to pay no more; and therefore the verdict was given for that sum. This case proceeded precisely upon the same principles as the case of *Wiseman v. Vandeput*; where, though it was determined that the legal property in the goods, before they arrived, was in the consignee, yet the Court of Chancery held that the consignee should not avail himself of that beyond what was due to him: but for what was due, the court directed an account; and if anything were due from the Italians to the Bonnells, that should be paid the plaintiffs. The plaintiffs in this cause are exactly in the situation of the plaintiffs in that case; for they have the legal property in the goods; and, therefore, if anything be due to them, even in equity, that must be paid before any person can take the goods from them: and 520% was due to them, and has not been paid.

After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped *in transitu*, after they have been sold and paid for, or money advanced upon them *bond fide*, and without notice, I do not conceive that the case is open to any arguments of policy or convenience; but if it should be thought so, I beg leave to say, that *in all mercantile transactions, one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible*. If this judgment stand, no man will be safe either in buying or in lending money upon goods at sea. That species of property will be locked up; and many a man who could support himself with honour and credit, if he could dispose of such property to supply a present occasion, would receive a check which industry,

caution, or attention could not surmount. If the goods are in all cases to be liable to the original owner for the price, what is there to be bought? There is nothing but the chance of the market; and that the buyer expects as his profit on purchasing the goods, without paying an extra price for it. But Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, lien, nor a right to seize *in transitu*. The great advantage which this country possesses over most, if not all other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports: but amidst all these indulgences, the wise merchant is not unmindful of his true interests and the security of his capital. I will beg leave to state, in as few words as possible, what is a very frequent occurrence in the city of *London*:—A cargo of goods of the value of 2000*l.* is consigned to a merchant in *London*; and the moment they are shipped, the merchant abroad draws upon his correspondent here to the value of that cargo; and by the first post or ship he sends him advice, and incloses the bill of lading. The bills, in most cases, arrive before the cargo; and then the merchant in *London* must resolve what part he will take. If he accepts the bills, he becomes absolutely and unconditionally liable; if he refuses them, he disgraces his correspondent, and loses his custom directly. Yet to engage for 2000*l.*, without any security from the drawer, is a bold measure. The goods may be lost at sea; and then the merchant here is left to recover his money against the drawer as and when he may. The question then with the merchant is, how can I secure myself at all events? The answer is, I will insure; and then if the goods come safe I shall be repaid out of them; or, if they be lost, I shall be repaid by the underwriters on the policy: but this cannot be done unless the property vest in him by the bill of lading; for otherwise his

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* St. 19 G. 3,
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policy will be void for want of interest ;* and an insurance, in the name of the foreign merchant, would not answer the purpose. This is the case of the merchant who is wealthy, and has the 2000*l.* in his banker's hands, which he can part with, and not find any inconvenience in so doing ; but there is another case to be considered, viz.—Suppose the merchant here has not got the 2000*l.*, and cannot raise it before he has sold the goods?—the same considerations arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due. Then the question is, how can that be done? If he have the property in the goods, he can go to market with the bill of lading and the policy, as was done *Snee v. Prescott* ; and upon that idea he has hitherto had no difficulty in doing so : but if he have not the property, nobody will buy of him ; and then his trade is undone. But there is still a third case to be considered ; for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea. I will put the case, by way of example, that barilla is shipped for a merchant here, at a time when there has been a dearth of that commodity, and it produces a profit of 25*l. per cent.*, whereas, upon an average, it does not produce above 12*l.* The merchant has advices that there is a great quantity of that article in Spain, intended for the British market ; and when that arrives, the market will be glutted, and the commodity much reduced in value. He wishes, therefore, to sell it immediately whilst it is at sea, and before it arrives ; and the profit which he gets by that is fair and honourable : but he cannot do it if he have not the property by the bill of lading. Besides, a quick circulation is the life and soul of trade ; and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded. From the little experience which I acquired on this subject at *Guildhall*, I am confident that if the goods in question be retained from the plaintiff without repaying him what he has advanced on the credit of them, it will be mischievous to the trade and commerce of this country ; and it seems

to me that not only commercial interest, but plain justice and public policy, forbid it. To sum up the whole in very few words: the legal property was in the plaintiff; the right of seizing *in transitu* is founded on equity. No case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them; but Lord *Hardwicke's* opinion was clearly against it; and the law, where it adopts the reasoning and principles of a court of equity, never has and never ought to exceed the bounds of equity itself. I offer to your lordships, as my humble opinion, that the evidence given by the plaintiff, and confessed by the demurrer, is sufficient in law to maintain the action.

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Ashhurst and *Grose*, Justices, also delivered their opinions for reversing the judgment of the Exchequer Chamber.

Accord
Ashhurst and
Grose, JJ.

Eyre, C. J., *Gould, J.*, *Heath, J.*, *Hotham, B.*, *Perryn, B.*, and *Thomson, B.*, *contra*.

Contra the
other judges.

This case stood over from time to time in the House: and was postponed, in order to consider a question which arose in another case of *Gibson v. Minet*, upon the nature and effect of a demurrer to evidence, which was thought to apply also to the present case; and, finally, the House reversed the judgment of the Exchequer Chamber, which had been given for the defendant; and ordered the King's Bench to award a *venire de novo* (upon the ground that the demurrer to evidence appeared to be informal upon the record) and that the record be remitted.

Judgment of
Exchequer
Chamber
reversed.

THIS celebrated case involves two important propositions. The former is, that *the unpaid vendor may, in case of the vendee's insolvency, stop the goods sold, in transitu*. The latter, that *the right to stop in transitu may be defeated by negotiating the bill of lading with a bonâ fide indorsee*. The right of a vendor to stop *in transitu* is bestowed upon him in order to prevent the injustice which would take place, if, in consequence of the vendee's insolvency, while the price of the goods

was yet unpaid, they were to be seized upon in satisfaction of his liabilities, and so the property of one man were to be disposed of in payment of the debts of another. The doctrine was first introduced in Equity by the cases of *Wiseman v. Vandeput*, 2 Vern. 203; *Snee v. Prescott*, 1 Atk. 246, and *D'Aquila v. Lambert*, 2 Eden, 75, Amb. 39. It has since been repeatedly discussed in courts of common law; and it appears strange, that though *stoppage in transitu* has been for many years one of the most practically important branches of commercial law, yet its precise effect upon the contract of sale has never as yet been ascertained. A highly interesting disquisition upon its history and character will be found in Lord Abinger's judgment in *Gibson v. Carruthers*, 8 M. & W. 336.

The question whether *stoppage in transitu* rescind the contract of sale altogether, or only puts the vendor in possession of a lien on the goods defeasible on payment of the price agreed on, has often been matter of controversy, particularly in *Clay v. Harrison*, 10 B. & C. 99, and was said in *Stephens v. Wilkinson*, 3 B. & Ad. 323, to be still undetermined. See also *Wilmhurst v. Bowker*, 5 Bing. N. C. 547; in error, 8 Scott, N. R. 570; [7 M. & G. 882, S. C.]; *Gibson v. Carruthers*, 8 M. & W. 321; *Wentworth v. Outhwaite*, 10 M. & W. 451; and *Edwards v. Brewer*,

2 M. & W. 375. Lord Kenyon in *Hodgson v. Loy*, 7 T. R. 445, was of opinion that it was not a rescission of the sale, but was (to use his lordship's own words) "an equitable lien adopted by the law for the purpose of substantial justice," whence it was held to follow that part payment of the price by the vendee would not destroy the right to stop *in transitu*, but only diminish the lien *pro tanto*. Confusion has sometimes arisen on this subject, from its being assumed that a vendor's right over the goods in respect of his price is subject to the same rules as an ordinary *lien* which cannot exist without both the right and the fact of possession, and is lost and cannot be resumed if the party claiming it abandon either the possession, or the right to possess the thing over which it is claimed: whereas "the vendor's right in respect of his price," says Bayley, J., delivering judgment in *Bloxam v. Sanders*, 4 B. & C. 948, "is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession, and the right of property, vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he become insolvent before he obtains pos-

session, *Tooke v. Hollingworth*, 5 T. R. 215. If the seller has dispatched the goods to the buyer, and insolvency occur, he has a right in virtue of his original ownership to stop them *in transitu*. *Mason v. Lickbarrow*, 1 H. Bla. 357; *Ellis v. Hunt*, 3 T. R. 464; *Hodgson v. Loy*, 7 T. R. 440; *Inglis v. Usherwood*, 1 East, 515; *Bothlingk v. Inglis*, 3 East, 381. Why? Because the *property* is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the *possession*, and his insolvency without payment of the price defeats that right. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act on their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights, *Gordon v. Harpér*, 7 T. R. 9." This luminous view of the principles upon which an unpaid vendor's right depends, is, as will have been seen, totally inconsistent with the idea that *stoppage in transitu* operates as a rescission of the con-

tract of sale, and deserves the more attention because it is contained in the written judgment of the court delivered after a *curia advisari vult*; see, too, *Edwards v. Brewer*, 2 M. & W. 875; *Martindale v. Smith*, 1 G. & D. 1; 1 Q. B. 397, S. C.; [the opinion of *Buller, J.*, in the text, p. 736, and the judgment of *Williams, J.*, in *Johnston v. Stear*, 15 C. B. N. S. 330, 339]. In *Wentworth v. Outhwaite*, 10 M. & W. 451, Parke, B., in delivering the judgment of the Court of Exchequer, stated that the question discussed above, "what the effect of stoppage *in transitu* is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided," and that "there are difficulties attending each construction." In that case, one of several parcels of goods sold under an entire contract had reached the place of destination; and upon the stoppage of the rest *in transitu*, the vendor insisted that the effect was to rescind the contract of sale altogether, and consequently to revest in him the property in the part which had reached the place of destination. The barons of the Exchequer decided against that argument, but for different reasons; the majority of the court, Parke, Alderson, and Rolfe, BB., being

strongly inclined to think, that upon the weight of authority a stoppage *in transitu* must be considered, not as a rescission of the contract, but as merely replacing the vendor in the same position as if he had not parted with the possession; from which it followed that the vendor's right of lien on the part stopped was revested, and no more; whilst Lord Abinger expressed an opinion, to which on consideration he adhered, that the effect of stoppage *in transitu* is to rescind the contract; but he did not think that that affected the right of the vendee in the case before the court, to retain the portion of the goods which had been actually delivered to him; or, in other words, had reached the place of their destination; more especially when the goods and the price might be apportioned, and a new contract be implied from the actual delivery and retention of a part. The arguments in *Wentworth v. Outhwaite* contain the authorities on either side of the question, to which may be added, that in the later case of *Jenkyne v. Osborne*, 8 Scott, N. R. 522, *post*, 751. Tindal, C. J., in delivering a considered judgment of the Court of Common Pleas, spoke of stoppage *in transitu* as a right to *rescind the contract*; but the nature of the right was not there in question. It is conceived (notwithstanding the weight of Lord Abinger's opinion on a subject in which his

practised and sagacious mind was eminently calculated to arrive at a correct conclusion) that the preponderance of reason and authority is in favour of the opinion expressed by the majority of the court in *Wentworth v. Outhwaite*.

Supposing the contract of sale not to be rescinded, it seems to follow, that the goods, while detained, remain at the risk of the vendee, and that the vendor can have no right to resell them, at all events until the period of credit is expired; after that period, indeed, the refusal of the vendee or his representatives to receive the goods *and* pay the price, would probably be held to entitle the vendor to elect to rescind the contract, see *Langford v. Tiler*, Salk. 113; [see *per Buller, J.*, in the leading case, *ante*, p. 736]. But what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep them till the time of credit has expired? In such a case it is submitted that courts of law having originally adopted this doctrine of *stoppage in transitu* from equity, would act on equitable principles by holding the vendor invested with an implied authority to make the necessary sale. It is hardly necessary to add, that a wrongful stoppage *in transitu* has not the effect of rescinding the contract of sale, or of affecting the vendor's right to sue for the price, acquired before the stoppage. *In re Humberston*

1 De Gex, 262; and see *Gillard v. Brittan*, 8 M. & W. 575.

The person who stops *in transitu* must be a consignor [or vendor]. A mere surety for the price of the goods has no right to do so, *Siffken v. Wray*, 6 East, 371. But a person residing abroad, who purchases goods for a correspondent in England, whom he charges with a commission on the price, but whose name is unknown to those from whom he makes the purchases, may stop the goods *in transitu* if his correspondent fail while they are on their passage, for the [purchaser] abroad [may] be considered as a new vendor, selling the goods over again to the merchant in England, and only adding to the price the amount of his commission. *Feise v. Wray*, 3 East, 93; see [*Falke v. Fletcher*, 18 C. B. N. S. 403; 34 L. J. C. P. 146; and] *Newsom v. Thornton*, 6 East, 17, where a person who had consigned goods to be sold on the joint account of himself and the consignee, was held entitled to stop them *in transitu*, the consignee becoming insolvent. [So a person who buys goods for another on his own credit and takes bills of lading indorsed for delivery to his own order, and then indorses the bills to the party for whom he bought, is a vendor for the purpose of stoppage *in transitu*: *The Tigress*, Brown & Lush. Adm. Ca. 38; 32 L. J., Adm. 97, S. C]. In *Jenkyns v. Usborne*, 8 Scott, N. R.

522; 7 M. & G. 678, S. C., it was attempted, but without success, to confine the right to vendors in whom the property in the goods has actually vested at the time of the stoppage, and to exclude from it a vendor in whom the property in the goods had not vested at the time of the stoppage, but only an interest in and right to receive a certain portion of a cargo to be afterwards ascertained and appropriated to the parties interested in it, of whom he was one. Tindal, C. J., in giving judgment, said: "We see no sound distinction with reference to the right of stoppage *in transitu*, between the sale of goods the property of which is in the vendor, and the sale of an interest which he has in a contract for the delivery of goods to him; if he may rescind the contract in the one case, for the insolvency of the purchaser, he must, by parity of reasoning, have the right to rescind it in the other." As to what is a sufficient authority from the vendor to enable another person on his behalf to stop goods *in transitu*, see *Whitehead v. Anderson*, 9 M. & W. 518.

Stoppage *in transitu*, as its name imports, can only take place while the goods are on their way; if they once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end of the vendor's right over them. And, therefore, in most of the cases the dispute has

been whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the cases is, that they are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that, if, after their arrival at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop *in transitu*. See *Nicholls v. Lefevre*, 2 Bing. N. C. 83; *James v. Griffin*, 1 M. & W. 20; *Edwards v. Brewer*, 2 M. & W. 375; [*Nicholson v. Bower*, 1 E. & E. 172, *per* Lord Campbell, C. J.;] and *James v. Griffin, iterum*, 2 M. & W. 623; where the court differed on the question whether evidence of the vendee's intention not to take possession uncommunicated to the wharfinger was admissible. *Mills v. Ball*, 2 B. & P. 457; *Holst v. Pownall*, 1 Esp. 240; *Northey v. Field*, 2 Esp. 613; *Hodgson v. Loy*, 7 T. R. 440; *Smith v. Goss*, 1 Camp. 282; *Coates v. Railton*, 6 B. & C. 422; *Richardson v. Goss*, 3 B. & P. 127; *Scott v. Petit*, 3 B. & P. 469; *Foster v. Frampton*, 6 B. & C. 109; *Allen v. Gripper*, 2 Tyrw. 217; *Rowe v. Pickford*; [8 Taunt.

83]; *Hurry v. Mangles*, 1 Camp. 452; *Stovell v. Hughes*, 13 East, 408; [*Heinekey v. Earle*, 8 E. & B. 410, affirmed in error, *Ibid.*, 427; and see *Cooper v. Bill*, 3 H. & C. 722; 34 L. J. Exch. 161, S. C.]. The arrival of the goods at a place where they are to be at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the *transitus*, although the place be not that of their ultimate destination, *Wentworth v. Outhwaite*, 10 M. & W. 436; *Dodson v. Wentworth*, 5 Scott, N. R. 821; 4 M. & Gr. 1080, S. C.; [see *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261;] because in such a case the goods have got into the hands of agents for the buyer, not concerned merely in the carriage of the goods. [See *Bolton v. The Lancashire Rail. Co.*, 35 L. J. C. P. 137; S. C. 1 Law Rep. C. P. 43, where the goods were at first held for the sellers, and on refusal by the buyer (who had taken away part) to take the rest, the transit was held not to have ended.] And the same, as it seems, where the goods have got into the hands of a person employed by the buyer to receive them from the first carrier or out of the warehouse where they were when sold, and give them a new destination, as in *Valpy v. Gibson*, [4 C. B. 837,] where the goods had been ordered for the Valparaiso market, and the Court of Common Pleas expressed their opinion that the

transit was at an end upon the arrival of the goods in the hands of the vendee's shipping agent at Liverpool. In *Cowasjee v. Thompson*, 5 Moore (Privy Council), 165, the goods were purchased in London "free on board," to be paid for upon delivery on board, in a bill at six months, or cash less two and a half per cent. discount, at the seller's option. The goods were delivered by the seller into a vessel indicated by the purchaser, and a receipt for them was obtained from the mate, which the seller kept. The seller elected to be paid by bill, which was accordingly given, and the master, *without requiring the return of the mate's receipt*, signed bills of lading for the goods as shipped by the purchaser. By the custom of the port, the phrase "free on board" imports that the buyer is considered as the shipper, though the seller is to bear the expense of shipment. The judicial committee held that the transit was at an end, and the right to stop gone, so soon as the goods were put on board, and the bill given for the price. *Quære*. See also *Van Casteel v. Booker*, 2 Exch. 691, [*Browne v. Hare*, 3 H. & N. 484, S. C., affirmed in error, 4 H. & N. 822, 29 L. J. Exch. 6, *Schluster v. McKellar*, 7 E. & B. 705, *Green v. Sichel*, 7 C. B. N. S. 747, and *Moakes v. Nicholson*, 19 C. B. N. S. 290, 34 L. J. C. P. 273, S. C.,] as to how far the intention with which the goods were shipped

may affect the question, and when and how far in this sort of case it is one of fact for the jury, even though the documents are not express upon the point.

Whilst, however, goods sold remain in the hands of a carrier employed to convey them to their original destination as between the buyer and seller, no case of *constructive* possession in the buyer arises, unless "where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him;" *Whitehead v. Anderson*, 9 M. & W. 518. And in the absence of such a new agreement, it seems that the mere acts of marking or sampling the goods, or giving notice to the carrier to hold the goods for the buyer, though done with the intention to take possession, do not establish a constructive possession in the buyer, or affect the right to stop *in transitu*, *Ibid.*; and see *Dixon v. Yates*, 5 B. & Ad. 313. The same law holds in the case of goods which, when sold, are on a wharf or in a dock, where they are intended to remain until taken away by the buyer. In such a case the goods are considered as

constructively *in transitu* (see the remarks of Lord Abinger in *Gibson v. Carruthers*, 8 M. & W. 341), and the right of the vendor to stop *in transitu* remains so long as the goods are not taken away, and the warehouse keeper or dock owner has not become the agent of the buyer, see *Dixon v. Yates*, 5 B. & Ad. 313; *Tanner v. Scovell*, 14 M. & W. 28, where the wharfinger, upon orders received direct from the seller, to weigh and deliver the goods to the buyer, had accordingly furnished the seller with the weights, and delivered a portion of the goods to the buyer's order; yet, inasmuch as the wharfinger had not received warehouse rent from the buyer, or transferred the goods into his name, or done any other act to become his agent, the rest of the goods, without regard to whether the *property* in them had vested in the buyer or not, were considered subject to the seller's right of stopping *in transitu*; and *Lackington v. Atherton*, 8 Scott, N. R. 38; 7 M. & Gr. 360, S. C., where the seller, who had himself bought the goods of the importer, in whose name they were warehoused in the West India docks, gave the buyer a delivery order upon which the dock company refused to act, because not given by the importer; and upon the subsequent insolvency of the buyer, the seller himself obtained a delivery order from the importer and possessed himself of the goods.

The question in all such cases seems to be, whether the warehouseman at the time of the stoppage held the goods *as agent for the consignor*, or *as agent for the consignee*. As to the effect of a delivery order both with respect to stoppage *in transitu* and otherwise, see *Harman v. Anderson*, 2 Camp. 243; *Stonard v. Dunkin*, Ibid. 344; *Bentall v. Burn*, 3 B. & C. 423; [*Farina v. Home*, 16 M. & W. 119;] *Searle v. Keeves*, 2 Esp. 598 (*quære*); *Akerman v. Humphrey*, 1 C. & P. 53; *Tucker v. Ruston*, 2 C. & P. 86; *Swanwick v. Sotheron*, 9 A. & E. 895; *Melling v. Kelshaw*, 1 C. & J. 184; *M'Ewan v. Smith*, 2 H. of Lords, 365; [*Dixon v. Bovill*, 3 Macq. H. of L. 1; *Godts v. Rose*, 17 C. B. 229; *Pearson v. Dawson*, E. B. & E. 448; *Kingsford v. Merry*, 1 H. & N. 503.]

If the vendor allow the vendee to take possession of part of the goods sold under an entire contract, without intending to retain the rest, his right to stop *in transitu* is gone. *Hammond v. Anderson*, 1 N. R. 69. See *Sluby v. Hayward*, 2 H. Bl. 504; *Hanson v. Meyer*, 6 East, 614. [See however *Bolton v. The Lancashire, &c. Rail. Co.*, post, p. 755.] But it is otherwise if he do intend to retain the remainder, *Bunney v. Poyntz*, 4 B. & Ad. 570; see *Wentworth v. Outhwaite*, 10 M. & W. 451; *Tanner v. Scovell*, 11 M. & W. 28. It was said that *prima facie*, a delivery of part imports an

intention to deliver the whole. *Per* Taunton, J., *Betts v. Gibbins*, 2 A. & E. 73. That *dictum*, however, which had been questioned by the author in his work on mercantile law (third edition, 463, 507; fourth edition, 459, 502; fifth edition, 488, 530), has been over-ruled by the Court of Exchequer, in *Tanner v. Scovell*, 14 M. & W. 28, where it was laid down that if the buyer takes possession of part, not meaning thereby to take possession of the whole, but to separate that part, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part and no more. In that case, under a general order to deliver the goods, the buyer procured the actual delivery of certain portions of them which he had resold, and the delivery of those portions was held not to operate as a delivery of the whole, or to affect the vendor's right as to the rest. And in *Jones v. Jones*, 8 M. & W. 431, the assignee of a cargo of goods under a trust deed, took possession of part of the cargo upon its arrival, and directed the rest to be conveyed to a designated place, with the intention of obtaining possession of the whole for the purposes of the trust; and it was held that such taking possession of part did put an end to the transit; but it was in that case assumed to be clear law that the mere delivery of part to the buyer, if he means to separate that part from the remainder, does not amount to a delivery of the whole so as to defeat the right to stop *in transitu*. In *Tanner v. Scovell*, *supra*, the whole question was stated to depend on *the intention of the buyer*; but perhaps that statement was intended to apply only to cases like *Tanner v. Scovell*, where it was in the power of the buyer at the time, if he pleased, to take all. [See the judgment in *Bolton v. The Lancashire, &c. Rail. Co.*, 35 L. J. C. P. 137, where the buyer took part, having the power to take all, and refused to take the rest, and the right to stop was held not to be gone.]

It was once thought that, although the determination of the *transit* puts an end to the vendor's right to stop the goods, the vendee [could not] anticipate its natural determination, as, for instance, by going to meet the goods at sea. *Holst v. Pownall*, 1 Esp. 240. *Vide tamen*, the judgments in *Mills v. Ball*, 2 B. & P. 461; *Oppenheim v. Russell*, 3 B. & P. 54; *Foster v. Frampton*, 6 B. & C. 107; and *Whitehead v. Anderson*, 9 M. & W. 518, where it was laid down as indisputable, that if the vendee take the goods out of the possession of the carrier into his own before their arrival, the right to stop *in transitu* is at an end; though, if he were to take them without the consent of the carrier, it might be a wrong to him for which he would have a

right of action. [See also *The London and North-Western Rail. Co. v. Bartlett*, 7 H. & N. 400.]

✓ The carriers cannot *prolong* the transit of the goods after arrival at the port of destination, by refusing to give them up to the consignee upon demand and tender of freight, *Bird v. Brown*, 4 Exch. 786. Nor can the vendor's right be defeated by the enforcement of a claim against the vendee, as, for instance, by process of foreign attachment at the suit of his creditor, or by the carrier's assertion of a general lien against him. *Smith v. Goss*, 1 Camp. 282; *Butler v. Woolcot*, 2 N. R. 64; *Nicholls v. Lefevre*, 2 Bing. N. C. 83.

✓ To make a *notice* effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal whose servant has the custody, it must be given at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant, in time to prevent the delivery of the goods to the consignee. *Whitehead v. Anderson*, 9 M. & W. 518. [The right of stoppage is not only to countermand delivery to the vendee, but to order delivery to the vendor, and the master on receiving such order is bound to deliver to the latter as soon as he knows that the order was given by him; *The Tigris*, Brown. &

Lush., Adm. Ca. 38; 32 L. J. Adm. 97, S. C.]

A stoppage by an unauthorized person professing to act for the seller is inoperative, though ratified by the seller, if such ratification be after the period during which the seller himself could have stopped *in transitu*; *Bird v. Brown*, 4 Exch. 786.

The second vendee of a chattel cannot, generally speaking, stand in a better situation than his immediate vendor. *Small v. Moate*, 9 Bing. 574; [*Kern v. Deslandes*, 10 C. B. N. S. 205; 30 L. J. C. P. 297, S. C.; *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618; *Schuster v. M'Kellar*, 7 E. & B. 704.] If, therefore, the vendee sell the goods before they have been delivered to him, he sells them, generally speaking, subject to the vendor's right to stop *in transitu*. *Dixon v. Yates*, 5 B. & A. 313; *Jenkyns v. Osborne*, 8 Scott, N. R. 505; 7 M. & G. 678, S. C. But on this rule the principal case has engrafted an exception; for the second and main point in *Lickbarrow v. Mason* is, that the vendee may, by negotiating the bill of lading to a *bonâ fide* transferee, defeat the vendor's right to stop *in transitu*. A succinct history of the law on this point is given by Lord Tenterden, in his admirable work on Shipping, p. 388, [10th ed. by Shee, 406.] where he remarks, that "the earliest mention of the subject in our law books is the case of *Evans*

v. *Martlett*, 1 Lord Raym. 271, 12 Mod. 156; in which Holt, C. J., said 'the consignee of a bill of lading has such a property, that he may assign it over:' and Shower said 'that it had been adjudged so in the Exchequer.' But in that case, the effect of such an assignment was not properly before the court, and does not appear to have been discussed or argued; and the case supposed to be referred to by Shower has not been found. In the case of *Snee v. Prescott*, 1 Atk. 246, the right of the pawnee of the bill of lading as against the consignor was not noticed or insisted upon." He then proceeds to comment on the cases of *Wright v. Campbell*, 4 Burr. 2046, 1 Bl. 628; *Hibbert v. Carter*, 1 T. R. 445; *Caldwell v. Bull*, Ibid. 205; and *Lickbarrow v. Mason*; and concludes by stating, [p. 408, 10th ed.], that "that cause was tried again, and that the Court of King's Bench, at the head of which Lord Kenyon had in the meantime been placed, and who had, in another cause, expressed his approbation of the first judgment in this case, as being founded on principles of justice and common honesty, again decided the case without argument, in conformity to the first decision of that court; 5 T. R. 683; and in order that the question might again be carried to the other tribunals, another writ of error was brought; but it was afterwards abandoned, and it is

now the admitted doctrine in our courts that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor." That is to say, an absolute right and property in the goods; but before the statute 18 & 19 Vict. c. 111, the transfer of a bill of lading did not, like that of a bill of exchange, confer any right on the assignee to sue upon the contract expressed thereby. *Thompson v. Dominy*, 14 M. & W. 403; *Howard v. Shepherd*, 9 C. B. 296. That statute, however, has altered the law in this respect. By the first section rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or indorsee to whom the property in the goods shall pass. [See *Fox v. Nott*, 6 H. & N. 630; 30 L. J. Exch. 259, S. C., showing that the section was not intended to exonerate the original shipper; *Short v. Simpson*, 35 L. J. C. P. 147; and *The St. Cloud*, Brown. & Lush., Adm. Ca. 4.] By the second section it is provided that the act is not to affect the right of stoppage *in transitu*, or claims for freight against the shipper or owner of the goods, or the consignee or indorsee as owner, or by reason of his receipt of the goods. It should seem that the statute has not altered the rule, that the indorsement of a bill of lading gives no better

right to the indorsee than the indorser himself had, and that in this respect a bill of lading still differs from a bill of exchange in the same way as it did before the statute; see *Gurney v. Behrend*, 2 E. & B. 622. In that case the bill of lading was sent in a letter from the shipper stating that he had drawn against the consignment, and it was held that the acceptance of the draft was not thereby made a condition precedent to the right to negotiate the bill of lading, though if it had been, and had not been complied with, an indorsement of the bill of lading would not have defeated the seller's title. And see *Key v. Cotesworth*, 7 Exch. 595; [and *Schuster v. McKellar*, 7 E. & B. 704. If the shipper indorses the bill as a pledge, and whilst it is so held the goods are misdelivered, he may, on reindorsement of the bill to him on payment of the advance for which it was pledged, sue for the misdelivery; *Short v. Simpson*, 35 L. J. C. P. 147. The rights and liabilities of the consignee or indorsee under the act, pass from him by indorsement over; *Smithwaite v. Wilkins*, 11 C. B. N. S. 842; 31 L. J. C. P. 214, S. C.] Where the goods are shipped under such circumstances as to show an intention that the property or right of possession should not vest in the consignee until some further act is done, such as payment, or handing over the bill of lading, no question of

stoppage *in transitu* can arise before that act is done. See *Turner v. Liverpool Docks*, 6 Exch. 543; [*Sheridan v. New Quay Co.*, 4 C. B. N. S. 618.] See further as to the effect of a bill of lading, *Jenkyns v. Usborne*, 8 Scott, N. R. 505; 7 M. & G. 678, S. C., *per curiam*; *Bryans v. Nix*, 4 M. & W. 775; *Bruce v. Wait*, 3 M. & W. 15; [*Hoare v. Dresser*, 7 H. of Lords Cases, 290, 733; *Ericksen v. Barkworth*, 3 H. & N. 894, Cam. Scacc.; *The Calcutta and Birmah, &c. Co. v. Demattos*, 33 L. J. Q. B. 214; *Reynolds v. Jex*, 34 L. J. Q. B. 251;] as to its being revocable, *Mitchell v. Ede*, 3 P. & D. 513; 11 A. & E. 88, S. C.;—as to its effect when goods are not on board, *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; 18 & 19 Vict. c. 111, s. 3; [*Valieri v. Boyland*, 1 Law Rep. C. P. 382; *Meyer v. Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289;] *Bryans v. Nix*, 4 M. & W. 775;—[as to its negotiability after the landing of the cargo at the port of destination, *Meyerstein v. Barber*, C. P. November 24, 1866, or where possession of it has been obtained by fraud, (*The Marie Joseph*) *Pease v. Gloahac*, 1 Law Rep. Privy C. 219;—as to] unusual terms [concerning] freight, *Turner v. Liverpool Docks*, 6 Exch. 543; [*Neish v. Graham*, 8 E. & B. 505; *How v. Kirchner*, 11 Moore, P. C. 21; *Kirchner v. Venus*, 12 Moore, P. C. 361;—as to the consignee's

right to sue the shipowner in *assumpsit* for not delivering the goods, *Tronson v. Dent*, 8 Moore, P. C. 419;]—as to a mate's receipt, *Evans v. Nichol*, 4 Scott, N. R. 43; *Thomson v. Small*, 1 C. B. 328; *Cowasjee v. Thompson*, 5 Moore P. C., 165; [*Schuster v. McKellar*, 7 E. & B. 705; —as to liens against indorsees for charter-party freight, *Foster v. Colby*, 3 H. & N. 705; *Shand v. Sanderson*, 4 H. & N. 381; *Gilkison v. Middleton*, 2 C. B. N. S. 134; *Kirchner v. Venus*, *supra*; *Kern v. Deslandes*, 10 C. B. N. S. 205; *Reynolds v. Jex*, *supra*; *Fry v. The Chartered Mercantile Bank of India*, 35 L. J. C. P. 306;—as to *Kirchner v. Venus*, *Tanvaco v. Simpson*, 19 C. B. N. S. 453,—as to the immunity from liability of the indorsee for demurrage under a charter-party; *Chappel v. Comfort*, 10 C. B. N. S. 802; —and as to the right of the consignee or indorsee to sue in the Admiralty Court, 24 Vict. c. 10, s. 6, and *The St. Cloud*, *supra*.]

— If the assignee of a bill of lading act *malâ fide*; for instance, if he knows that the consignee of the goods is insolvent, and takes the assignment of the bill of lading for the purpose of defeating the right to stop *in transitu*, and so defrauding the consignor out of the price; he will be held to stand in the same situation as the consignee: and the consignor will preserve his right of stoppage. Per Lord Ellen-

borough, delivering judgment in *Cumming v. Brown*, 9 East, 514. And if the bill of lading contain a condition, *ex. gr.*, if it be indorsed upon it, that the goods are to be delivered, provided E. F. pay a certain draft, every indorsee takes it subject to that condition, and will have no title to the goods, unless it be performed. *Barrow v. Coles*, 3 Camp. 92.

A factor, however, to whom goods were consigned, stood in a different situation from a vendee with respect to his power to pass the property therein by an indorsement of the bill of lading. For, though he might bind his principal by a sale thereof, he could not by a *pledge*, that not being within the usual scope of his authority. *Martin v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, *Ibid.*, 484; *Newsom v. Thornton*, 6 East, 17. But by statute 4 Geo. 4, c. 83, amended by 6 Geo. 4, c. 94, usually called the Factor's Act, the law upon this subject was altered.

By [the latter] statute, sec. 2, a person *intrusted with*, and in possession of any bill of lading, is to be deemed the true owner of the goods described in it, so far as to give validity to any contract made by him, for the sale or disposition of the goods, or any part thereof, *or for the deposit or pledge thereof, or any part thereof*, as a security for any money, or negotiable instrument, provided the buyer, disponent, or pawnee, have

no notice by the bill, or otherwise, that he was not the actual *bonâ fide* owner of the goods. (Upon the question who is to be considered a person “intrusted” with in the meaning of this section, see *Close v. Holmes*, 2 M. & Rob. 23; *Phillips v. Huth*, 6 M. & W. 605; *Hotfield v. Phillips*, 9 M. & W. 647; 14 M. & W. 665; 12 Cl. & Fin. 343, S. C.; *Bonzi v. Stewart*, 5 Scott, N. R. 1; 4 M. & G. 525, S. C.; [*Baines v. Swainson*, 4 B. & S. 270; 32 L. J. Q. B. 281, S. C.]; and as to what is a “disposition,” see *Taylor v. Kymer*, 3 B. & Ad. 337.) But by sec. 3, if the deposit or pledge be as a security for a *pre-existing demand*, the deposittee or pawnee acquires only the same interest in them that was possessed by the person making the deposit or pledge. [As to the 4th section, see *Baines v. Swainson*, *supra*.] Sect. 5 enacts that any person may accept any such goods or document as aforesaid, on deposit or pledge, from any factor or agent, *notwithstanding he shall have notice* that the party is a factor or agent; but in such case he shall acquire such interest and no further or other, as was possessed by the factor or agent at the time of the deposit or pledge; and, therefore, in this last case, if the agent’s interest be defeasible, so is the pledgee’s. *Blandy v. Allen*, Dans. & Lloyd, 22; *Fletcher v. Heath*, 7 B. & C. 517. A fraudulent sale cannot be upheld as a pledge under this

section. *Thompson v. Farmer*, 1 M. & M. 48. As to the pleadings upon [this statute], see *Bonzi v. Stewart*, 5 Scott, N. R. 1; 4 M. & G. 295; 8 Scott, N. R. 525; [7 M. & G. 746.]

The provisions of this statute (6 Geo. 4, c. 94), being found insufficient to meet the wishes or convenience of merchants, stat. 5 & 6 Vict. c. 39, “An act to amend the law relating to advances *bonâ fide* made to agents intrusted with goods,” was passed (30th June, 1842).

The 1st section, after reciting *inter alia*, that by 6 Geo. 4, c. 94, “validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title to goods and merchandize, and consignees making advances to persons abroad who are intrusted with any goods and merchandize are entitled, under certain circumstances, to a lien thereon, but under the said act and the present state of the law, advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only;” and that “advances on the security of goods and merchandize had become an usual and ordinary course of business, and it was expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances

upon goods and merchandize as by the 6 Geo. 4, c. 94, is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the 6 Geo. 4, c. 94, or otherwise, would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof;" and that "much litigation had arisen on the construction of the 6 Geo. 4, c. 94, that it did not extend to protect exchanges of securities *bonâ fide* made, and so much uncertainty existed in respect thereof, that it was expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis;" enacts "that from and after the passing of this act any agent who shall hereafter be intrusted with the possession of goods" [*Freeman v. Appleyard*, 32 L. J. Exch. 175], "or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, *advance*, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof,

and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, *notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.*"

This, as well as the other provisions of the statute, though wide enough in terms to include many other cases, has been limited in construction to mercantile transactions. So that in *Wood v. Rowcliffe*, 6 Hare, 191, where it was contended that advances made upon the security of furniture in a furnished house, not in the way of trade, to the apparent owner of the furniture, who in fact was an agent intrusted with the custody of it by the true owner, were within the protection of 5 & 6 Vict. c. 39, Sir James Wigram, V. C., held the contrary, saying in the course of his judgment: "the first act (6 Geo. 4, c. 94) is for the 'protection of the property of merchants and others,' and the property referred to is 'goods, wares, and merchandize,' intrusted to the agent 'for the purpose of consignment or sale,' or 'shipped;'" [see the first section of the act;] "and upon a judicial construction of the act it has been held that the generality of the expressions must be restricted. Every servant of the owner of goods employed in the care or carriage of such goods, is

in one sense 'an agent intrusted with goods,' but still he is not an agent within the meaning of the statute; *Monk v. Whittenbury*, 2 B. & Ad. 484. The title of the second act (5 & 6 Vict. c. 39) is more general; but it appears to me to relate to 'agents,' and to 'goods and merchandize,' in a sense which is not applicable to the agency or the property in this case." In *Monk v. Whittenbury*, *supra*, it was considered that a carrier, warehouseman, packer, or wharfinger, is not "an agent" within 6 Geo. 4, c. 94; and Sir James Wigram, V. C., appears to have treated that decision as applicable also to the construction of 5 & 6 Vict. c. 39. [See *Baines v. Swainson*, 4 B. & S. 270, in which a commission agent and factor, with whom goods were warehoused, was held to be intrusted within s. 4 of 6 Geo. 4, c. 94, a power of sale being, of course, incidental to his business as factor; *Lamb v. Attenborough*, 1 B. & S. 831; 31 L. J. Q. B. 41, where a wine-merchant's clerk was held not to be his "agent" within the meaning of the act, but only his servant; and *Hayman v. Flewker*, 13 C. B. N. S. 519; 32 L. J. C. P. 132, S. C., where a person intrusted with pictures for sale on commission, and whose ordinary business did not extend to selling on commission, was held to be an "agent" within 5 & 6 Vict. c. 39, s. 1, as his employment on the occasion corresponded with that of a factor.

See also *Gobind Chunder Sein*, app., *Valentine Ryan*, resp., 9 Moore, Ind. Ap. 140; and *Sheppard v. The Union Bank of London*, 7 H. & N. 661; S. C. 31 L. J. 154. For the purposes of the act, the fact of the goods having been obtained from the principal is immaterial; *Ibid.*] In *Jenkyns v. Usborne*, 8 Scott, N. R. 505; 7 M. & G. 678, S. C., a vendee who had received from the vendor a delivery order for the goods, was considered not to be a person intrusted with a delivery order within the 6 Geo. 4, c. 94, s. 2, so as to be capable of making a valid pledge of the delivery order, and so defeating the right of stoppage *in transitu*; the act being intended only to apply to persons intrusted with such documents as factors or agents; and the vendee being in possession of the document, not as the agent of another, but in his own right. That would *à fortiori* hold good in a case arising upon the construction of 5 & 6 Vict. c. 39, s. 1, where the word "agent" is expressly used. And therefore, where the person intrusted is *not intrusted as agent but as buyer*, the right of his assignee is not holpen by 5 & 6 Vict. c. 39, but must stand or fall by the rule laid down in *Lickbarrow v. Mason*. Upon this point *Jenkyns v. Usborne* is confirmed by *Van Casteel v. Booker*, 2 Exch. 691.

The 2nd section authorises the *substitution* of other goods, documents of title, or negotiable secu-

rities for those first deposited in consideration of a previous advance; but provides that the lien acquired upon the substituted property shall not exceed the then value of the property given up. The decision which pointed out the necessity for that section was *Bonzi v. Stewart*, 4 M. & G. 525, 5 Scott, N. R. 1, S. C. [See upon the construction of it, *Sheppard v. Union Bank of London*, 7 H. & N. 661.]

Sect. 3 provides and enacts that the act shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made *bond fide*, and *without notice* that the agent making such contracts or agreements is acting *without authority* or *malâ fide* against the owner; that "it shall not be construed to extend to or protect any lien or pledge for an antecedent debt;"—nor to authorise any agent in deviating from any expressed order or authority received from the owner; "but that, for the purpose and to the intent of protecting all such *bond fide* loans, advances, and exchanges as aforesaid, (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority,) and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such

goods." It has been held upon the construction of this section, that notice that the factor had the goods for sale was not of itself notice that he had no authority to pledge, *Navulshaw v. Brownrigg*, 21 Law J. Chanc. 57, Vice-Chancellor (Lord Cranworth), *Ibid.* 908, [2 De G. Mac. & G. 441,] on appeal, Lord Chancellor (Lord St. Leonards.) [As to the proper mode of putting the question of notice to a jury, see *Gobind Chunder Sein*, app., *Valentine Ryan*, resp., 9 Moore, Ind. Ap. 140; 5 Law T., N. S. 559, S. C.]

By the 4th section "any *bill of lading*, *India warrant*, *dock warrant*, *warehouse keeper's certificate*, *warrant or order for the delivery of goods*, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a *document of title* within the meaning of this act:—and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been *intrusted* with the possession

of the goods represented by such document of title as aforesaid : ”— (This legislative interpretation of the word “intrusted” was rendered necessary by the decisions in *Phillips v. Huth*, 6 M. & W. 605, and *Hatfield v. Phillips*, 9 M. & W. 647, affirmed in the H. of Lords, 14 M. & W. 647, 12 Cl. & Fin. 343, S. C., that a factor intrusted with a bill of lading, and who, by reason of having the bill of lading, was enabled to and did (but not in pursuance of the instructions of his principal) possess himself of a dock warrant, was not to be considered a person intrusted with the dock warrant within the meaning of 6 Geo. 4, c. 94 : [see the distinction between intrusting with, and enabling to obtain possession of, illustrated by Crompton, J., in *Baines v. Swainson*, 4 B. & S. 270 :])—And “all contracts *pledging or giving a lien upon such document of title* as aforesaid shall be deemed and taken to be respectively *pledges of and liens upon the goods* to which the same relates : ”—“And such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his *actual custody*, or shall be held by any other person subject to his control or for him or on his behalf : ”—And “where any loan or advance shall be *bonâ fide* made to any agent intrusted with and in possession of any such goods or documents of title as aforesaid, on the faith of *any contract or agreement in*

writing to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall *actually be received* by the person making such loan or advance, *without notice* that such agent was not authorised to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this act, *though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto* : ”—(This enactment may have sprung from the inclination of opinion expressed upon the second point argued but not decided, in *Bonzi v. Stewart*, 4 M. & G. 295 ; 5 Scott, N. R. 1 :)—And “any contract or agreement, whether made direct with such agent as aforesaid, or *with any clerk or other person on his behalf*, shall be deemed a contract or agreement *with such agent* : ”—And “*any payment* made, whether *by money or bills of exchange* or other negotiable security, shall be deemed and taken to be an *advance* within the meaning of this act : ” — “*negotiable security*,” that is, *for the payment of money, semble*, *Taylor v. Kymer*, 3 B. & Ad. 320 ; and although the words are *any payment*, yet with reference to the object of this act, they must be construed to mean

any payment by way of *loan* or *advance*, and not to include a case where the real object of the parties is not a loan or advance, such as was *Learoyd v. Robinson*, 12 M. & W. 745, where the factor being liable with the defendant on a bill of exchange, obtained a sum of money from the defendant to take up the bill at the same time depositing with him the plaintiff's goods. In that case the direction of the judge, Coltman, J., to the jury to find for the plaintiff if they considered what was done to be "only a circuitous mode of paying the bill on which the defendant was liable," was upheld by the Court of Exchequer:— And "an agent *in possession* as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been *intrusted* therewith by the owner thereof, *unless the contrary can be shown in evidence*."

The 5th section provides that nothing in the act contained shall lessen, vary, alter, or affect the civil responsibility of an agent for any breach of duty or contract or non-fulfilment of his orders or authority.

[The 6th section has been repealed by 24 & 25 Vict. c. 95, but, with some alteration, re-enacted by an act consolidating and amending the statutes relating to larceny and like offences, *viz.*, 24 & 25 Vict. c. 96, by the 78th section of which a factor or] agent exercising the powers virtually

conferred upon him by [5 & 6 Vict. c. 39] *malâ fide*, and without the authority of his principal, [is] subject to punishment by [penal servitude or imprisonment], as for a misdemeanor, unless where the property dealt with is not made a security for or subject to the payment of any greater sum of money than the amount which at the time was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent: or [by s. 85 of the 24 & 25 Vict. c. 96] unless he shall, previously to his being [charged with the offence], have *disclosed it*, [*R. v. Skeen*, 1 Bell C. C. R. 97; 28 L. J. M. C. 91] on oath, in consequence of compulsory process in any proceeding *bond fide* instituted by any party aggrieved, or in an examination or deposition before any court of bankruptcy or insolvency.

Sect. 7 [of the 5 & 6 Vict. c. 39] preserves the right of the owner to redeem, and enables him to prove under the bankruptcy of the agent for the amount paid to redeem, or the value of, the goods.

The 8th section is the common interpretation clause, and the 9th and last excludes a retrospective application of the provisions of the act.

This act, 5 & 6 Vict. c. 39, it may be observed, relates to *advances* upon the security of goods, and it will still be necessary to

resort to the 2nd and 4th sections of 6 Geo. 4, c. 94, in cases not falling within that category.

Let us return to the effect of the indorsement of a bill of lading upon the right to stop *in transitu*. In cases where a bill of lading may be, and has been, pledged by the consignee of the goods, as a security for his own debt, the legal right to the possession of the goods passes to the pledgee; but the right to stop them *in transitu*, in case the consignee should become insolvent, is not absolutely defeated, as it is in the case of a sale of the bill of lading by the consignee; for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right, at least in equity, to the residue which may remain, after satisfying the pledgee's claim. And further, if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledger himself, the vendor will have a right to have all the pledger's own goods appropriated to the discharge of the pledgee's claim before any of the goods comprised within the bill of lading are so. This was decided *In re Westzinthus*, 5 B. & Ad. 817, where Lapage & Co. having purchased oil from plaintiff Westzinthus, paid for it by acceptance: and being in possession of the bills of lading, pledged them with Hardman & Co., as a security for certain advances. Lapage & Co.

became bankrupt, and their acceptance in the plaintiff's favour was dishonoured. At the time of their bankruptcy they owed Hardman & Co. 9271*l.* on account of advances; as a security for which they held, besides the bill of lading, goods to the value of 961*l.* 1*s.* 7*d.*, belonging to Lapage himself. The court held that Westzinthus, who had, upon the bankruptcy of Lapage & Co., given notice to the master of the ship that he claimed to stop the oil *in transitu*, had a right to insist upon the proceeds of Lapage's own goods being appropriated to the discharge of Hardman's lien, and, as they proved sufficient to satisfy it, had a right to receive the entire proceeds of his oils.—“As Westzinthus,” said Lord Denman, delivering the judgment of the court, “would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession, for a valuable consideration to Hardman, it appears to us, that in a court of equity, such transfer would be considered as a pledge or mortgage only; and Westzinthus would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage, in analogy to the common case of a mortgage of real estate, which is considered as a mere security, and the mortgagor, the owner

of the land. We, therefore, think that Westzinthus, by his attempted stoppage *in transitu*, acquired a right to the goods in equity (subject to Hardman's lien thereon), as against Lapage and his assignees, who are bound by the same equity that Lapage himself was; and this view of the case agrees with the opinion of Mr. Justice Buller, in his comment on the case of *Snee v. Prescott* in *Lickbarrow v. Mason*. If then Westzinthus had an equitable right to the oil subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become a surety to Hardman for Lapage's debt; and would then have a clear equity to oblige Hardman to have recourse against Lapage's own goods deposited with him to pay his debt in ease of the surety. And all the goods, both of Lapage and Westzinthus, having been sold, he would have

a right to insist upon the proceeds of Lapage's goods being appropriated, in the first instance, to the payment of the debt." *Spalding v. Ruding*, 6 Beav. 376, confirms Westzinthus's case, and shows, that *the goods cannot be retained as security for a general balance of account*, but only for the specific advance made upon security of the bill of lading.

[In *Meyerstein v. Barber*, C. P. 24 November, 1866, it was considered that a first pledge of a bill of lading after the goods were landed at a sufferance wharf under a stop for freight, before the stop was taken off, and whilst the bill of lading continued to be by mercantile usage the document of title to the goods, (though no further delivery of possession took place), was equally valid against a subsequent pledge, as if the first pledge had been made during the voyage.]

MILLS v. AURIOL.

TRIN.—20 GEO. 3, IN C. P. & B. R.

[REPORTED 1 H. BLACK. 433, AND 4 T. R. 94.]

The bankruptcy of the defendant cannot be pleaded in bar of an action of covenant for rent.

Covenant for
non-payment
of rent.

THIS was an action of covenant for non-payment of rent payable quarterly. The covenant on which the breach was assigned, after the usual words, “yielding and paying, &c.,” was as follows:—“And the said Peter James (the defendant) for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree (amongst other things) to and with the said Benjamin (the plaintiff), his heirs and assigns, that he the said Peter James, his heirs, executors, administrators, or assigns, should and would, during all the rest of the said term, thereby demised, well and truly pay, or cause to be paid, unto the said Benjamin, his heirs and assigns, the said clear yearly rent of 110*l.*, in manner and form aforesaid, according to the true intent and meaning of the said indenture.” The breach was the non-payment of 27*l.* 10*s.*, for a quarter ending December 25, 1789.

3rd plea, bank-
ruptcy before
rent began to
accrue.

The defendant pleaded, 1st, *Non est factum*. 2nd, *Riens in arrears*. 3rd, “That after the making of the said indenture in the said declaration mentioned, and before the suing out of the original writ of the said Benjamin against the said Peter James, *to wit*, on the first day of January in the year of our Lord 1789, and from thence until the day of suing out the commission of bankruptcy herein mentioned against the said Peter James, he the

said Peter James was a trader within the intent and meaning of the several statutes made and then in force against bankrupts; that is to say, a merchant, dealer, and chapman, *to wit*, at *London* aforesaid, in the parish and ward aforesaid, and during all that time used and exercised the trade and business of a merchant, in buying and selling divers silks, and other goods, wares, and merchandizes, and receiving consignments of silks and other goods, and selling the same on commission, for his correspondents and customers, for profit and gain, and thereby sought and endeavoured to get his living as other persons of the same trade usually do; and the said Peter James so being such trader as aforesaid, within the intent and meaning of the said several statutes made and then in force concerning bankrupts, and so seeking his living by way of buying and selling as aforesaid, he the said Peter James afterwards, and before any of the rent or money in the said declaration mentioned became due and payable, *to wit*, on the 8th day of June, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, became and was indebted to one George Tickner Hardy, gentleman, then being a subject of this realm, in 100*l.* of lawful money of Great Britain, for so much money before that time paid, laid out, and expended by the said George Tickner Hardy, to and for the use of the said Peter James, at his special instance and request; and the said Peter James being so indebted as aforesaid, and being a subject of this realm, and so seeking his living by way of buying and selling as aforesaid, he the said Peter James, afterwards, *to wit*, on the same day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, (he the said George Tickner Hardy so being a creditor of the said Peter James, and being then wholly unsatisfied his debt,) manifestly became a bankrupt, within the intent and meaning of the several statutes made and then in force against bankrupts; and the said Peter James so being and remaining a bankrupt as aforesaid, he the said George Tickner Hardy, as well for himself as for all other creditors of the said Peter James, afterwards, *to wit*,

Plea of bankruptcy.

Plea of bankruptcy.

on the 9th day of June, in the year aforesaid, at *Westminster* in the county of *Middlesex*, to wit, at *London* aforesaid, in the parish and ward aforesaid, exhibited his certain petition in writing to the Right Honourable Edward Lord *Thurlow*, then Lord High Chancellor of Great Britain, and thereby petitioned the said Lord Chancellor, to grant to the said George Tickner Hardy his majesty's commission to be directed to such and so many persons as he should think fit to give his authority of and concerning the said bankrupt, and to all other intents and purposes, according to the provisions of the statutes made and then in force concerning bankrupts, as by the said petition remaining in the Court of Chancery of our lord the now king at *Westminster* aforesaid more fully appears; and the said Peter James further saith, that upon the said petition of the said George Tickner Hardy so exhibited as aforesaid, on behalf of himself and all other the then creditors of the said Peter James, according to the form of the statutes in such case made and provided, for giving them relief on that behalf, afterwards, and before the said sum of money in the said declaration mentioned or any part thereof became due, and before the said supposed breach of covenant, to wit, on the 9th day of June in the year aforesaid, at *Westminster* aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, a certain commission of our lord the now king, founded upon the statutes made and then in force concerning bankrupts, in due form of law issued, under the great seal of Great Britain, bearing date the same day and year last aforesaid, directed to Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, Esquires, and was then and there to them directed, by which said commission, our said lord the now king gave full power and authority to them the said Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, four or three of them, to proceed, according to the said statutes, and all other statutes then in force concerning bankrupts, not only concerning the aforesaid bankrupt,

his body, lands, tenements, both freehold and copyhold, goods, debts, and all other matters whatsoever, but also concerning all other persons, who by concealment, claim, or otherwise, should offend touching or concerning the premises, or any part thereof, against the true intent and purport of the said statutes, and to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the creditors of the said Peter James, as towards and for all other intents and purposes whatsoever, according to the order and provisions of the said statutes, as by the said commission (amongst other things) more fully appears: by virtue of which said commission, and by force of the statutes aforesaid, the said Michael Dodson, Edward Finch Hatton, and Rôbert Comyn, three of the commissioners named in the said commission, afterwards, *to wit*, on the 11th day of June, in the year aforesaid, *to wit*, at *London* aforesaid, in the parish and ward aforesaid, having taken upon themselves the burthen of the said commission, then and there duly adjudged and declared the said Peter James to have been, and become on the day of the issuing of the said commission, and then to be a bankrupt, within the true intent and meaning of the said statutes, some or one of them: and the said Peter James further says, that afterwards, *to wit*, on the 26th day of June in the year aforesaid, at *London* aforesaid, (the said Peter James then remaining and continuing a bankrupt as aforesaid,) they the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, in due manner and according to the form of the statute in such case made and provided, by an indenture then and there duly made, and bearing date the same day and year last aforesaid, between the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, of the one part, and Robert Mendham, of *Walbrook, London*, merchant, George Marsh, of *Broad Street, London*, silk-broker, and the said George Tickner Hardy of the other part, then and there duly bargained, disposed, assigned, and set over, amongst other things, the said indentures of lease in the said declaration mentioned, and all the estate and interest of

Plea of bankruptcy.

Plea of bankruptcy.

the said Peter James, of, in, and to the same, and of, in and to the premises thereby demised, to the said Robert Mendham, George Marsh, and George Tickner Hardy, (the said Robert Mendham, George Marsh, and George Tickner Hardy, before the said assignment so made to them as aforesaid, having been duly chosen assignees of the debts, credits, goods and chattels, estate and effects of the said Peter James the bankrupt, according to the form of the statutes in such case made and provided,) to hold to them the said Robert Mendham, George Marsh, and George Tickner Hardy, their executors, administrators, and assigns, from thenceforth, for the residue of the said demised term then to come and unexpired; by virtue of which said assignment, all the estate, interest, and term of years then to come and unexpired, property, claim, and demand, of the said Peter James, of and in the said indenture of lease, and of and in the premises thereby demised, then and there became, and was vested in the said Robert Mendham, George Marsh, and George Tickner Hardy, as such assignees, and the same from thence hitherto hath been, and still is vested in them, the said Robert Mendham, George Marsh, and George Tickner Hardy (the said commission still remaining in full force and effect, in no ways superseded, cancelled, or set aside), and the said Robert Mendham, George Marsh, and George Tickner Hardy, then and there, *to wit*, on the same day and year last aforesaid, at *London*, aforesaid, became, and were for a long time, *to wit*, from thence hitherto have been, possessed of and in the said demised premises, with the appurtenances, and this the said Peter James is ready to verify," &c.

General demurrer to third plea.

To this plea there was a general demurrer, and issue joined on the two first.

Argument for the plaintiff.

The demurrer was argued in Easter Term last by *Bond*, Serjt., for the plaintiff, and *Le Blanc*, Serjt., for the defendant; and in this term by *Adair*, Serjt., for the plaintiff, and *Lawrence*, Serjt., for the defendant. The following was the substance of the arguments on the part of the plaintiff:—

The matter disclosed in the third plea affords no answer to the demand of the plaintiff, because the covenant on which the action is brought being express, personally bound the defendant, and was not done away by the assignment under the commission of bankrupt. In leases there are two sorts of covenants, by which tenants are liable either to an action of debt or covenant; namely, express and implied covenants. On the latter, the lessee is liable to either species of action, unless there has been a complete assignment with the assent of the lessor, for by such an assignment the right of action of the lessor is certainly divested. *Walker's Case*, 3 Co. 22 a., where the lessee, having assigned his term without the assent of the lessor, was still holden to be subject to debt for the rent in arrear. So in *Wadham v. Marlow* (a) Lord Mansfield

Argument for the plaintiff.

(a) *Wadham v. Marlow*, B. R. Mich. 25 G. 3.

* This was an action of debt for rent due on a lease which was expired. The defendant pleaded: 1. *Non est factum*. 2. As to 18l. 5s. one quarter's rent, that he became a bankrupt, and that the said sum of 18l. 5s. was due before his bankruptcy. 3. As to the residue of the sum demanded, that

it became due after the bankruptcy. On the first plea issue was joined. On the second, the plaintiff remitted the 18l. 5s., and demurred generally to the third.

It was argued in support of the demurrer, that where there is an assignment by the original lessee, if the lessor accepts rent of the assignee, the lessee is thereby discharged, it being an acceptance of the assignee as tenant. The lessor may either resort to the lessee on the privity of contract, or the assignee on the privity of estate. But having made his election against whom to proceed, he is bound by it. *Walker's Case*, 3 Co. 22; *Devereux v. Barlow*, 2 Saund. 181. The case of *Coghill v. Freelove*, 3 Mod. 325, goes farther, as there it is said, that privity of contract with the testator is not discharged by his death. In *Cantril v. Graham*, Barnes, 69, the court interposed on behalf of the liberty of the person. That is like the case of a certificated bankrupt having by a subsequent promise made himself liable to a debt contracted before his bankruptcy, where the court have permitted a common appearance.

As to the general question, whether the plaintiff can recover notwithstanding the assignment? the bankrupt may indeed say, that he has parted with his whole interest, and that it is hard he should be called to account on a contract previously made. But if there be any hardship, it is for the legislature to interpose. Bankruptcy arises from the act of the bankrupt himself; he therefore is liable as much as any other lessee. The certificate can discharge from no debt but what is due before the bankruptcy. *Aylett v. James*, C. B. 22 G. 3, which was an action of covenant; the defendant pleaded his discharge under an insolvent act, and on demurrer judgment was given for the plaintiff. It was there said, that a bankrupt is liable for covenants made before his bankruptcy; and there seems to be no reason why he should not also be liable for a debt accruing in consequence of a covenant made before it.

For the defendant it was contended, that debt was only brought on the reddendum of the lease. Plowd. 132; Co. Litt. 142, a.; 2 Black. Com. 41. It is payable out of the land, not on account of the land. The moment the lessee parts with the possession, the action can no longer be maintained. Notice to the lessor of the assignment by the lessee is sufficient to discharge him. There is a great difference between covenant and debt on the reddendum; the words "yielding and paying" create a covenant to pay, but only on condition that the lessee shall enjoy. It does not hold after eviction, or loss of possession. But after loss of possession the party is still liable on an express covenant. 1 Sid. 447; 1 Brownl. 20. Rent arises on a contract executory. Suppose the bankrupt had entered into a contract to deliver goods at a future day; his assignees might have affirmed or disaffirmed the contract. All his personal engagements pass to them. If the term be of greater value than the rent, it shall be presumed that the assignees have accepted it, and the lessee shall be exonerated. The privity of contract is destroyed by the assignment. When the lessee is deprived of the land without remedy over, he ceases to be liable for the rent. So it is on eviction, entry, and expulsion. Plowd. 71; Noy, 75. So if deprived by the act of God. 1 Roll. Abr. 236. But here the defendant is deprived by the act of law. 7 Vin. Abr. 84; 1 Atk. 67. A commission of bankruptcy is an

* Cooke's Bankrupt Laws, last edit. 511.

Argument for
the plaintiff.

says that the tenant shall not by his own act destroy the tenancy without the concurrence of the landlord. As the law is thus with regard to the action of debt on an implied covenant, so also it is with respect to the action of covenant on an implied covenant, in which the general rule is, that without the assent of the lessor, the lessee shall not discharge himself from his covenant by an assignment of the term.

Thus the law stands as to implied covenants. But with regard to an express covenant, though it be true that no action of debt will lie on it against the lessee after an assignment, where the lessor has by a direct act (such as the acceptance of rent from the assignee) confirmed the assignment, Cro. Jac. 334, yet it is equally true, that on an express covenant, an action of covenant will lie for the lessor against the lessee, notwithstanding his acceptance of rent from the assignee. 1 Sid. 402; Cro. Jac. 309; Cro. Car. 188, 580; Cas. temp. Hardwicke, 343; and in

execution in the first instance, not an act of the party. Burr. 2439, *Mayor v. Steward*. There is a difference between an insolvent person and a bankrupt.

Lord Mansfield.—Two points were argued for the plaintiffs. 1st, If there had been no bankruptcy, but the lessee had merely assigned to another, he would still remain liable in debt, till the lessor had assented to the assignment. 2nd, Bankruptcy being an act done by the bankrupt himself, he shall remain liable like any other lessee. As to the first point, it is not necessary that there should be an actual acceptance of rent by the lessor in order to discharge the lessee from the action of debt on the reddendum; but any assent is sufficient. The action on the reddendum is founded, not merely on the terms of the demise, but on the enjoyment of the tenant. In *Warren v. Conset*, 2 Lord Raym. 1500, it was agreed that “levied by distress and *sic nil debet*” was a good plea to debt for rent on an indenture. What shall be deemed an enjoyment by the tenant hath been much agitated as a question of law; but he cannot destroy the tenancy without the assent of the lessor. On behalf of the defendant it was argued, that notice to the lessor is a sufficient discharge of the lessee. But in the cases in Brownl. and Cro. Jac. there was an express acceptance; and in *Siderfin*, though the case is short and confused, it must be so understood. In 2 Saund. 181, it is said he may sue either assignee or lessee. In the present case there is neither acceptance of rent nor assent; and if there were nothing but notice, we are all of opinion that the lessee would be liable to the action. This brings me to the second point, on which there are only two cases; for that of *Aylett v. James*, does not apply. Those cases are, *Mayor v. Steward*, and *Cantrel v. Graham*. The first was determined on the ground that the covenant was collateral; but there is a strong though *obiter dictum* of Yates, J., that it would be hard to leave the lessee liable to the covenants, when the act of law had divested him of the emoluments and vested them in his creditors. In *Cantrel v. Graham*, the court made a direct determination on the point. We have a fuller note of it than there is in Barnes. The counsel said it was merely an effort made to relieve the defendant on account of the hardship of the case; but the court would not have discharged him unless they had been satisfied that the action was not founded. This case is precisely in point, and we agree with the determination. The bankrupt's estate is vested in the assignees by act of parliament. Every man's assent shall be presumed to an act of parliament. It was agreed, that if a man be divested by act of law without his own default, he is discharged. This is as strong, because, though it was his own act originally on which the assignment was founded, yet the immediate effect produced is by the act of parliament; *et in jure, non remota sed proxima spectantur*.

Judgment for the defendant.

Cro. Jac. 522; 1 Sid. 447; the distinction between express and implied covenants is taken; that in an express covenant, though the lessor accept rent from the assignee, yet he may have an action of covenant against the lessee, but not in case of an implied covenant, which, it is said, is cancelled by the assignment.

Argument for
the plaintiff.

The question then is, whether, in the present case, the lease and all the bankrupt's interest being vested in the assignees under the commission, he is discharged from an express covenant? Now the contrary appears from *Thursby v. Plant*, 1 Saund. 237. The assignees of a bankrupt are like any other assignees of a lease. The assignment under the commission is no more than any other assignment with the assent of the lessor, every one having virtually given his assent to an act of parliament. *Wadham v. Marlow*. A bankrupt, though divested of his property, is still liable on his express covenants.

The protection from debts which is given to bankrupts is on condition of a complete obedience to the regulations of the several acts passed on the subject. It is therefore material to consider what those regulations are. By 13 Eliz. c. 7, bankrupts were only discharged to the extent of the sum actually paid: and thus the law remained till the passing of 4 Anne, c. 17, by which a bankrupt surrendering, and conforming with the terms prescribed, was discharged from all debts due at the time he became a bankrupt; the reasons of which provisions are stated by Lord *Hardwicke*, 1 Atk. 256. To make the remedy complete, the statute 5 G. 2, c. 30, s. 7, gives the defence of a general plea of bankruptcy, and allows the certificate to be evidence in support of it. But the bankrupt is not discharged by these statutes from contingent debts,* *Tully v. Sparkes*, Lord Raym. 1546, nor from uncertain damages, nor from debts accruing after the act of bankruptcy, though arising on a cause preceding it. The certificate is not a bar to an action, founded on an express collateral covenant, which does not run with the land. *Mayor v. Steward*, 4 Burr. 2439. In that case the bankrupt was holden liable on an express covenant, and if he be so on one sort of express covenant, why not

(History of the
protection of
bankrupts.)

* [See now 12
& 13 Vict. c.
106, ss. 177,
178.]

Argument for
the plaintiff.

on another? The reason why in general the creditors of a bankrupt are barred by the certificate is, that they may prove their debts under the commission. But where the creditor cannot come in under the commission, there the certificate is not a bar; and in the present case no debt could be proved under the commission. The defence here set up is founded on a mere *obiter dictum* of Yates, J., in *Mayor v. Steward*, where he says, that "as the act divests the bankrupt of his whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon him, if he should remain still liable to it, when he is disabled by the act of parliament from performing it." But whether there would be a hardship or not, was a matter for the consideration of the legislature. In fact, the hardship would not be greater than in suing a felon after attainder and forfeiture of his lands; yet a felon in such a situation is liable to an action. *Bannister v. Trussel*, Cro. Eliz. 519; Noy, 1; Owen, 69. But in truth the hardship would be greater on landlords, if the tenant becoming a bankrupt were discharged from his express covenants. They would be liable to fraud, and might be deprived of their rent. The assignees of the bankrupt might assign the lease to an insolvent person, as in *Stra. 1221*, where the former assignee of a term made a further assignment to a prisoner in the Fleet, and by such assignment was discharged from debt for rent by the original lessor; it being holden that an assignee of a term was no longer liable than while the privity of estate continued, and he occupied the premises; which doctrine also agrees with *Walker's Case*. By assignment therefore the landlord may be left without remedy unless he should resort to the antiquated process of *cessavit*, or to the assistance of two justices under stat. 11 G. 2, c. 19, s. 16. Although an action of debt on the *reddendum* of a lease is barred by a bankrupt's certificate, according to the case of *Wadham v. Marlow*, and although an action of covenant on an implied covenant is also barred by an assignment, yet it does not follow that an action of covenant on an express covenant is likewise barred. Though the party be exonerated in

debt, he is not necessarily so in covenant. Debt lies on the *reddendum*, because a rent issues out of the land, Plowd. 132; Co. Litt. 142, a. It is payable out of the land, and when the possession of the land is parted with, the rent, and the action of debt for the recovery of it, are gone. But an express covenant is a solemn engagement from one man to another; it neither issues out of land nor is done away by the loss of possession. In 1 Salk. 82, it is said that the action of debt is founded on privity of estate, but covenant on privity of contract, which seems to be admitted. 7 Vin. Abr. 330. In the case of *Cotterell v. Hooke*, Dougl. 79, on covenant for non-payment of an annuity, it appeared on oyer, that there was a bond conditioned for payment of the annuity, besides the deed of covenant; it was pleaded that both were given for the same purpose, that the bond was avoided and the defendant discharged under an insolvent act. But the Court held, though the bond were forfeited before the discharge, yet the defendant might be sued afterwards on the covenant. To the same point is *Hornby v. Houlditch*, And. 40, the judgment of Lord *Harwicke*, which case is more fully stated in 1 Term Rep. B. R. 93, which is directly in point to show, that an assignment by an act of parliament does not discharge a party from an express covenant. So also in *Aylett v. James (a)*, which was an action of covenant, the defendant pleaded his discharge under an insolvent act, to which there was a demurrer, and judgment for the plaintiff, the Court saying, that a bankrupt was liable on an express covenant made before the bankruptcy. The case of an eviction is totally different, since in that case no rent is due, whether the eviction be by the lessor himself, or a person having a superior title.

Argument for
the plaintiff.

The following were the arguments for the defendant: Admitting the authority of the cases cited on the other side, which show that, where there is a voluntary assignment by a lessee, such assignment does not excuse him from an express covenant; admitting, also, that the acceptance of rent by the lessor from the assignee would not discharge the lessee from an express covenant; yet there is

(a) C. B. 22
G. 3.

Argument for
the defendant.

Argument for
the defendant.

a clear distinction to be made between an assignment by virtue of the bankrupt laws, and a voluntary assignment by the lessee. By the former, the bankrupt is divested by act of law of all the property, out of which, and in respect of which, the covenant was made. A covenant for payment of rent runs with the land; when therefore the tenant is evicted by a superior title, he is released from his covenant. When he is prevented from enjoying the land in respect of which he entered into the covenant, he is no longer liable on the covenant. Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal; Plowd. 71; 2 Black. Com. 41; when therefore the land is gone, there is an end of the profits; and it is on account of the profits that covenants of this kind are made. When the consideration is gone, the rent fails. 1 Roll. Abr. 454, pl. 8. Where the lessee makes a voluntary assignment of his term, he has it in his power to make what stipulations he pleases with the assignee; he may receive a consideration, may covenant for rent, for indemnity, and the like. But in case of bankruptcy, the bankrupt can make no stipulation, nor receive himself any valuable consideration. There is no analogy therefore between the assignment under a commission of bankrupt and a voluntary assignment by the lessee himself. But it is admitted on the other side, that a voluntary assignment will bar a covenant arising from the words "yielding and paying," &c., which it is said is only an implied covenant; but in Style, 387 and 406, those words were holden to make an express covenant. As to the hardship which is supposed to be brought upon the landlord, he may re-enter on non-payment of rent, may distrain, and resort to the land itself for satisfaction. But the lessee, if he be evicted, can have no such remedy: he might therefore suffer a greater hardship. In case of a lawful eviction, the lessee is discharged from his covenants; and where he is divested of his property by an act of parliament, it operates as an eviction, and he ought in justice to be equally discharged. Though the act of bankruptcy was originally his own act, yet the statute is an act of law, and according to Lord *Mansfield's* doctrine

in *Wadham v. Marlow*,* *in jure, non remota sed proxima spectantur*. The case of *Mayor v. Steward* is clearly in favour of the defendant, to show the analogy between an eviction of the tenant by the landlord, and an eviction under an act of parliament: there also the distinction is taken between collateral covenants, and those which run with the land. As to *Bannister v. Trussel*, there was no question in that case of rent reserved on a demise, and the particular enjoyment of certain land: the point was, whether an attainted person was freed generally from all his debts? which the Court very properly held he was not. In *Wadham v. Marlow*, Lord Mansfield says, "There is a strong though *obiter dictum* of Yates, J., that it would be hard to leave the lessee liable to the covenants, when the act of law has divested him of the emoluments and vested them in his creditors;" and his Lordship also says, that "in *Cantrel v. Graham* the Court would not have discharged the defendant unless they had been satisfied that the action was not founded." In *Ludford v. Barber*, though the point was not directly decided, yet the opinion of the Court seems to be plainly intimated, that if it had been a question like the present, the rule laid down in *Wadham v. Marlow* would have guided their determination. As to *Hornby v. Houlditch*, there was no bankruptcy in that case, but a South-Sea Director was for his misconduct deprived of his property by a bill in the nature of pains and penalties; there was no act of law operating for the benefit of an unfortunate tradesman; besides, there was a large sum reserved for the maintenance of the person who was the object of the punishment; that case therefore cannot be applied to the present. Here the lessor himself has taken away the obligation to pay the rent, by taking away the land which was the consideration of the covenant; since it was assigned by virtue of an act of parliament, to which, according to *Wadham v. Marlow*, the lessor was himself a party.

Argument for
the defendant.
* *Ante*, p. 773,
in notd.

Lord Loughborough.—There is no degree of doubt but that the law is established, that an action of covenant may be brought on a covenant to pay rent, though the

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for the plaintiff.

lessee be not in possession of the land, and after acceptance of rent from the assignee by the lessor. This is by privity of contract; but the distinction is clear between debt and covenant. Then when the term is taken under the assignment of commissioners of bankrupt, the question is, whether it is not by the act of the bankrupt himself? It is taken from him because he has contracted debts, and instead of any single creditor suing out a *fiery facias*, the common law execution, there being many creditors they join in taking out a commission of bankruptcy, which is in the nature of a statute execution. By this the property is vested in the assignees, but not so absolutely as in the vendee by a sale under a *fiery facias* made by the sheriff; because if the effects were sufficient without it, the term would remain to the lessee. Covenant then may well be brought against him. Though he is out of possession, yet he is placed in that situation by his own act. I am therefore of opinion that the demurrer ought to be overruled.

Accord. Gould,
Heath, and
Wilson, JJ.

Gould, J., of the same opinion.

Heath, J., of the same opinion.

Wilson, J.—The plea of the defendant is not supported by any adjudged case. It has never yet been decided that an action of covenant would not lie upon a covenant by a lessee which runs with the land, and which was entered into before, but broken after, the bankruptcy of the covenanter. I entertained no doubt on this question except what arose from the hints thrown out by some of the judges of the Court of King's Bench whenever the question has come before them, on account of the *dictum* of Yates, J., in *Mayor v. Steward*, that as the bankrupt is divested of his whole estate, and rendered incapable of performing the covenant, it would be a hardship upon him if he should still remain liable to it, when he is disabled by the act of parliament from performing it. But this opinion was clearly extra-judicial, for, under the circumstances of that case, the court held the plea to be bad. In *Wadham v. Marlow*, Lord Mansfield spoke of the opinion of Yates, J., as deserving great weight, though it

was extra-judicial. But in that case it was not stated that the plaintiff had accepted rent from the assignee as his tenant, and it was contended that debt as well as covenant would lie against the lessee, because the lessor had done no act to show his assent to the assignment. But the court decided, on the ground that the plaintiff had virtually assented to the assignment, every man's assent being implied to an act of parliament, and not on the ground that an action of debt would not lie. And in *Ludford v. Barber* the court gave judgment for the defendant, because the covenant declared upon had never been entered into by him with the plaintiff. Thus the question stands with respect to judicial decisions. The several statutes relating to bankrupts prior to the 4 Anne, c. 17, left the bankrupt not only liable to all contingent debts, but to the remainder of the debts which his effects had been unable to satisfy. The hardship was the same, for the bankrupt was deprived of his all, and yet left without any protection against his creditors. The statutes previous to that time meant to give an execution for the equal benefit of all the creditors, and, if they were not fully satisfied by it, to leave them for what was unsatisfied to every remedy against the bankrupt which they had before. Neither that statute, nor the now existing statutes upon the subject, extend to this case. The 34 Hen. 8, c. 4 (a), (a) Sect. 1. directs that the Lord Chancellor and other great officers shall have power to sell and dispose of the lands and goods of bankrupts in as full a manner as the bankrupt himself might have done. Subsequent statutes have empowered the assignees to make the same disposition. The intent of the several statutes was, that the act of the assignees should do no more than the act of the bankrupt himself. I therefore do not see how the maxim "*in jure, non remota sed proxima spectantur*" is applicable. The act of parliament only assigns the interest of the bankrupt in the land, but does not destroy the privity of contract between lessor and lessee. *An action of covenant remains after the estate is gone; but generally speaking, when the land is gone, the action of debt is also gone, debt being main-*

Judgments in
C. P. for the
plaintiff.

* See *Webb v. Jiggs*, 4 M. & S. 411; *Randall v. Rigby*, 4 M. & W. 134; where it was held on this principle that debt will not lie against a person who covenants to secure an annuity payable out of land.

tainable because the land is debtor. Covenant is founded on a privity collateral to the land.* A covenant of this kind is mixed; it is partly personal and partly dependent on the land; it binds both the person and the land. This brings the case within the principle of *Mayor v. Steward*.

Judgment for the plaintiff.

AURIOL v. MILLS, IN ERROR.

COVENANT in the Common Pleas for rent. Pleas, *non est factum*; *riens in arrière*; and the bankruptcy of the plaintiff in error, before the rent became due: in which plea it was stated, that the commissioners assigned the lease, in which the covenant was inserted, to the assignees for the residue of the term; and that by virtue of such assignment, all the estate, interest, and term of years then to come, &c., of the plaintiff in error in the lease, was and still is vested in the assignees. To the latter plea there was a general demurrer and joinder; and, after two arguments, in the Court of Common Pleas, judgment was given for the plaintiff below. The record having been removed into this court† by writ of error.

† [At this period error lay from C. P. to B. R.]

Argument for the plaintiff in error.

Park, for the plaintiff in error, contended, that the bankrupt was discharged from his covenant to pay rent by the assignment of all his property by the commissioners. The cases principally relied on in the Court of Common Pleas, 1 Sid. 401, 447; 1 Saund. 240; Cro. Jac. 309, 521; Cro. Car. 188, 580; and Cas. temp. Hardw. 343, only prove that the lessee cannot, by his own act, discharge himself from his express covenant, and are, therefore, not applicable to the present case; because here the bankrupt does not endeavour, by his own act, to discharge himself, but the estate, in respect of which he entered into the covenant, is taken from him by law. Now, the general principle of law, which holds a party liable on his express covenant, although the estate, in respect of which it was entered into, is gone, is founded on the presumption that the party voluntarily, and by his own act, assigned over the estate to a person in whom he

has confidence, and against whom he has a counter-remedy, if he himself be sued by the lessor. But here is no privity of contract between the bankrupt and the assignee under the commission; and, therefore, the reason for the upholding the privity of contract between the bankrupt and his lessor falls to the ground, especially too as the bankrupt could maintain no action against the lessor on any of his covenants. A party who enters into a covenant is only liable in two respects; either in respect of the estate which he enjoys, or on his personal contract. But in this case the first is assigned over, and is taken from the lessee by act of law, by a compulsory power which he cannot resist: and, as to the other, the law has taken away the means by which he was enabled to perform the contract: and he cannot remain liable on the covenant for himself and his assigns, for that means voluntary assigns; but here it appears by the record that the estate is vested in the assignees under the commission, who are not (legally speaking) the assignees of the bankrupt, but of the creditors or commissioners; the bankrupt himself does not even assign in point of fact; he is no party to the deed of assignment. It was contended in the Court of Common Pleas, that a bankrupt remains liable on his express covenants, because there are no express words in the statutes concerning bankrupts to discharge them: but they are by no means necessary; for in *Brewster v. Kitchell* (a), *Holt*, C.J., said, (a) *Salk.* 198. "If H. covenant to do a thing which is lawful, and an act of parliament come in and hinder him from doing it, the covenant is repealed;" for which was cited *Dy.* 27, pl. 278. In this case, the bankrupt is disabled from performing the covenant, which is the same thing; and the rule of law applies, *lex non cogit ad impossibilia*. A bankrupt is discharged by the bankrupt laws from such obligations as arise in respect of any property vested in the assignees by virtue of those statutes. In *Mayor v. Steward* (b), *Yates*, J., said, "as the act divests him of his whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon

Argument for
the plaintiff in
error.

(b) 4 Burr.
2448.

Argument for
the plaintiff in
error.

(a) Barnes, 69,
4to edition.

(b) H. Bl. Rep.
437, and Cook's
Bank. Laws,
518, 2nd edit.

(c) Bac. Law
Tr. 35.

him if he should remain still liable to it, when he is disabled by the act of parliament from performing it." And the court (though they held that the party was liable in that case, which was on a collateral covenant) nearly adopted the language of *Yates, J.* In *Cantrél v. Graham (a)*, that point was determined; and the authority of that case as well as the opinion of *Yates, J.*, were afterwards expressly recognised by this court in *Wadham v. Marlow (b)*, in which Lord *Mansfield*, after noticing those cases, and speaking of the effect of the assignment of the commissioners of bankrupts, concluded thus: "It was argued, that if a man be divested by act of law, without his own default, he is discharged; this is as strong; because, though it were his own act originally on which the assignment was founded, yet the immediate effect produced is by the act of parliament; *et in jure, non remota sed proxima spectantur.*" When this case was determined in the Common Pleas, it was thrown out by one of the judges, that that maxim was not applicable to a case like this: but on examination it will be found to apply with peculiar force. The objection is, that the bankrupt is divested of his estate by his own act: but according to Lord *Bacon's* illustration of the rule (c), though the act of bankruptcy be the primary cause on which the bankrupt laws attach, yet the immediate cause of his being divested of his estate is the assignment by the commissioners, beyond which the court are not to look. For he says, "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." And he puts this case: "If an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have access to him for his counsel, nevertheless the annuity is not determined by his non-feasance; yet it was the grantee's act and default to commit the treason whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not

giving counsel was compulsory, and not voluntary, in regard to the imprisonment." Now that is a much stronger instance than the present: for that proceeded on the express crime of the grantee. With respect to the case of *Hornby v. Houlditch* (a), which was relied on in favour of the plaintiff below: it is to be observed in the first place that it does not appear by a MS. note of that case, taken by *Lee*, C. J., that Lord *Hardwicke* concurred in opinion with the court: and, even if he did, that case is clearly distinguishable from the present. The question there depended on an act of parliament, a bill of pains and penalties, which was passed on account of the crimes of the South Sea Directors; and even there the directors had a certain sum (and that too a considerable one) reserved to them for the payment of their private debts; but bankrupts are considered as unfortunate traders rather than as criminals; the allowance to them when made, is very inconsiderable, and it is contingent whether or not they are to receive any allowance. Neither is this case like the one to which it was compared below, of a common law execution, where it is said that the tenant, whose term is thus taken from him, is liable on his covenant; because there the privity of contract is not at an end; the lessee has his remedy over against the vendee of the sheriff: whereas in this case the bankrupt has no control whatever over the assignees in whom the term is now vested. The argument *ab inconvenienti* may fairly be urged in construing the statutes relating to bankrupts: by determining that the bankrupt is discharged in this case, the lessor will not suffer, because he always has his remedy against the tenant in possession; whereas to hold that the bankrupt continues liable after his bankruptcy, is to decide that he is bound by his covenant to pay rent for an estate which is absolutely taken from him by the compulsory power of the law, and only in the expectation of enjoying which he entered into the covenant.

Argument for
the plaintiff in
error.

(a) Andr. 40,
and 1 T. R.
98, n. a.

Bond, Serjt., *contrâ*.—It appears from all the authorities on this subject, that nothing can discharge a person from his express covenant but the express words of an

Argument for
the defendant
in error.

Argument for the defendant in error.

(a) It does not appear clearly from the report of the case of *Cantrel v. Graham*, whether it were an action of debt or covenant; though, from some expressions used by the court in determining it, it rather appears to be the former.

act of parliament, or the release of the covenantee. The cases of *Wadham v. Marlow* and *Cantrel v. Graham* are not applicable to the present; for they were both (a) actions of debt. That species of action is founded on the possession of the tenant; and when the lessor consents that the lessee shall assign to another person, the lessee is discharged. But this action is founded on the express covenant of the lessee; and the case of *Hornby v. Houlditch* clearly proves that he remains liable on that covenant, notwithstanding his bankruptcy. That was a kind of statute execution like the present: and Lord *Hardwicke*, in giving his opinion on the case, alluded to the instance of a bankrupt. From the reign of Queen Elizabeth, when the first statute relating to bankrupts was passed, down to that of Queen Anne, bankrupts continued liable for their debts contracted before their bankruptcy, and the dividends under the commissions were only considered as a payment *pro tanto*: the statute 4 Anne (the reasons for making which provisions are stated by Lord *Hardwicke* in 1 Atk. 255-6) for the first time discharged them from their debts *in toto*; but that act only gives a discharge from debts due at the time of the bankruptcy. Now the demand made by the defendant in error in this case was not a debt due at the time of the bankruptcy, and therefore the plaintiff in error is not discharged from it. What fell from *Yates, J.*, in *Mayor v. Steward*, was merely an extrajudicial opinion, not necessary to be given on the case then before the court; and it was only an observation on the hardship of the case, without saying what the law was upon the subject. But if it be a case of hardship, it can only be remedied by the legislature, and not by the courts of law. A statute execution is analogous, in this respect, to a common law execution; in that, if a term be taken under a *fieri facias*, the lessee still continues liable on his covenant. So if a person be divested of all his property by attainder in felony, he is liable for his debts contracted before, though deprived by law of the means of paying them. Cro. Eliz. 516. There may possibly be some hardship on the lessee in

particular cases: but it would also be extremely hard on the landlord, if he were deprived of his remedy on the covenant of the lessee; for though he may always bring an action of debt against the tenant in possession, yet the term may be assigned over to an insolvent, as was done in the case 2 Str. 1221. It seems therefore in point of reason and justice, as well as of strict law, that the defendant in error is entitled to the judgment given in his favour by the Court of Common Pleas.

Argument for
the defendant
in error.

Buller, J., observed, that in arguing the case of *Wadham v. Marlow*, a case was cited from Hob. 82; and he asked the counsel whether that case affected the present. No answer being given,

The court said it would be proper, before they gave judgment, to look into the cases that had been mentioned.

Cur. adv. vult.

Lord *Kenyon*, C. J., on the next day delivered the opinion of the court.

Judgment in
error.—Lord
Kenyon, C. J.

It was not owing to any doubt that we entertained on this question that we did not pronounce judgment when the case was argued: but as a case was alluded to in *Hobart* which was not argued upon at the bar, we wished to have an opportunity of examining that case before we gave our opinion. But, on looking into it, we think that it does not press upon the present case; and we are all of opinion (in which *Buller*, J., who is now absent, concurs) that the judgment of the Court of Common Pleas must be affirmed. It is extremely clear, that a person who enters into an express covenant in a lease, continues liable on his covenant notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant which was taken in early times, is equally clear: if the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears by the authorities that an action of debt will not lie against the original lessee; but all those cases with one voice declare, that if there be an express covenant, the obligation on such covenant still continues. And this is founded not on precedents only, but on reason; for when a landlord grants a lease, he selects his tenant; he

Judgment in
error.—Lord
Kenyon, C. J.

trusts to the skill and responsibility of that tenant; and it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object, as in the case of an execution. In such a case the lessor has no choice of the under-tenant: so here the assignees are bound to sell the term, and perhaps they may assign to a person in whom the lessor has no confidence.

Then it remains to be considered whether any exception to that general rule has taken place in the case of a bankruptcy. It seemed admitted in the argument, and indeed it cannot be disputed, that where a disposition of the lease has been made by virtue of a *feri facias*, or an *elegit*, the lessee continues liable on his covenant, notwithstanding the estate be taken from him against his consent. On the same principle the South Sea Director was held liable, although he was divested of his property by the act of confiscation. So in the case of an attainder, and other cases, which it is not necessary to mention particularly, as they are all collected in the report of this case in the Common Pleas. Then, what is there peculiar in the case of a bankrupt which should differ it from those cases? No act of parliament has said that he shall be discharged from his covenants; neither is there any resolution in either of the courts of law to that effect; but, on the contrary, it has been uniformly determined in all the various cases on the subject, that for all contracts which are not to be performed till a period subsequent to the bankruptcy, the bankrupt shall still be liable, notwithstanding he is stripped of all his property; as in the case of *Goddard v. Vanderheyden* (a), and many others. So, in this case, the defendant's liability to pay happened after the bankruptcy; and therefore, on the principle of those cases, he remains liable, notwithstanding the commission of bankruptcy divested him of all his property; for a certificate would only have made him a new man from the time when the act of bankruptcy was committed. But instances have occurred where persons who have been declared bankrupts have been possessed of considerable property,

(a) 3 Wils.
262.

after paying all their debts; as in that of Sir S. Evans. Then, in reason, why should a person not continue liable on his covenant when his affairs are arranged? Then it was contended that the bankruptcy put an end to the privity of contract: but that argument is not well founded; for it was asked by Lord *Hardwicke*, in the case of *Hornby v. Houlditch*, as it is reported in the reports (a) of this Court, "what is there here to discharge the privity of contract or estate between the lessor and lessee? or what is there to discharge an express covenant?" In the language of Lord *Hardwicke*, I may ask the same questions in this case. Has the landlord done any act to discharge the lessee? Even in cases where the landlord has expressly consented to receive the assignee as his tenant, the original lessee has always been held liable on his covenant; and those are, in my opinion, much stronger cases than the present, where the assignees are forced upon the landlord without his consent. This is like the case of an execution, and, indeed, in some of the books it is called a statute-execution. In every view of the question, therefore, I am clearly of opinion, that this case was properly decided in the Court of Common Pleas, and that that judgment ought to be affirmed.

Judgment in error.—Lord *Kenyon*, C. J.

(a) 1 T. R. 93, n. a.

Judgment affirmed (b).

(b) See *Marks v. Upton*, 7 T. R. 305.

It appears to have been taken in the assignees, unless they do some act to manifest their assent to the assignment, as regards the term, and their acceptance of the estate. For "an assignment by commissioners of bankrupt is the execution of a statutable power given to them for a particular purpose, *viz.*, payment of the bankrupt's debts. Nothing passes from them, for nothing was previously vested in them. Whatever passes, for granted, throughout the argument in both courts, that the bankrupt's term had become properly vested in his assignees; and that that fact sufficiently appeared upon the pleadings. However, the case of *Copeland v. Stephens*, 1 B. & Ad. 593, has since decided that the general assignment of a bankrupt's personal estate under the *fiat* does not vest a term of years

passes by force of the statute, for the purpose of effecting the object of the statute; and therefore the assignees of a bankrupt are not bound to accept a term of years that belonged to the bankrupt, subject to the rent and covenants; for the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose, the acceptance of a term which, instead of furnishing the means of such a payment, would diminish the fund arising from other sources, cannot be within the scope of their trust or duty. And in this respect such a term differs from the debts of the bankrupt and his unincumbered effects and chattels. The whole estate remains in the bankrupt until acceptance by the assignees, subject to their right to have the land by their acceptance." *Per* Lord Ellenborough, C. J., *ibidem*. See *Ringer v. Cann*, 3 M. & W. 343, *per cur*. And although stat. 1 & 2 W. 4, c. 56, s. 25, abolished the assignment, and rendered the appointment of the assignees equivalent thereto; still, as it [gave] to the appointment an effect precisely co-extensive with that of the assignment, the doctrine of *Copeland v. Stephens* remained, as far as that statute is concerned, in full force. [Stat. 1 & 2 W. 4, c. 56, has been repealed by 12 & 13 Vict. c. 106, and the terms of the general clause, s. 14, of the

latter act, vesting the bankrupt's personal estate in the assignees, are wide enough to pass to them terms for years belonging to the bankrupt: the effect, however, of this general clause is, according to the rule "*generalibus specialia derogant*," restricted by the special section concerning leases, &c. (s. 145 below set forth), which, it will be seen, gives to the assignees not a mere right to renounce or disclaim leases made to the bankrupt, but an election to take or decline them, which election obviously could not exist if the assignees had already got the property, *Goodwin v. Noble*, 8 E. & B. 587; and see the judgments of Crompton, J., in *Mackley v. Pattenden*, 1 B. & C. 178; S. C.; 30 L. J. Q. B. 225; and of the court in *Bishop v. Trustees of Bedford Charity*, Cam. Scac., 1 El. & El. 697; 29 L. J. Q. B. 53. *Cartwright v. Glover*, 2 Giff. 620; 30 L. J. Chanc. 324, is, however, to the contrary.] So that, if the law now rested on the decisions in *Mills v. Auriole* and *Copeland v. Stephens*, a bankrupt lessee would be liable exactly as if no bankruptcy had taken place, until acceptance of the lease by his assignees; and, after their acceptance of it, he would continue liable on his express covenants, in the same manner as if the lease had passed into the hands of an ordinary assignee. And this it is important to remember, because, though the enactment now about to be cited improves the situation

of the bankrupt in some respects, yet there are very many cases to which it does not extend, and to those cases the above doctrines continue to apply in full force.

The Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106, s. 145), which extends the relief afforded by a previous enactment in 6 Geo. 4, c. 16, s. 75, as that had done the relief afforded by 49 Geo. 3, c. 121, sect. 19, enacts, *first*—"that if the assignees of the estate and effects of any bankrupt, having or being entitled to any land, either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease, or agreement for a lease, *shall elect to take* such land, or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the *conditions*, covenants, or agreements of any such conveyance or agreement, or lease or agreement for a lease : *secondly*—that if the assignees *decline to take* such land, or the benefit of such conveyance or agreement, or lease or agreement for a lease, as the case may

be, the bankrupt shall not be liable *if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for a lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be ; and, thirdly*—if the assignees shall *not* (upon being thereto required) *elect* whether they will accept or decline such land or conveyance, or agreement for conveyance or lease or agreement for a lease, any person entitled to such rent or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the court, and the court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit."

It has been held that *parol leases* fall within the similar section of the 6 G. 4, c. 16, s. 75, the offer to deliver possession being equivalent to the delivery up of the lease, *Slack v. Sharp*, 8 A. & E. 366; *accord. Ex parte Hopton*, 2 M. D. & D. 347 ; but see *Briggs v. Sowry*, 8 M. & W. 729, *per cur. obiter* ; [and *per* Crowder and Willes, J.J., in *Maples v. Pepper*, 18 C. B. 188 ; and *Colles v. Evan-son*, 19 C. B. N. S. 372 ; where a

plea under this section, not alleging a delivery up of the conveyance, &c., but only the execution by the lessee of a deed of surrender to the lessors, and a tender of the deed to them, and an offer to deliver up possession of the premises to them, was held not to be supported by *Slack v. Sharpe*, because it did not show that the statute could not be literally complied with, as, for instance, by showing that the lease was destroyed. It is hardly necessary to add, that the terms "agreement" and "conditions" in s. 145 of the 12 & 13 Vict. c. 106, do not apply to agreements or conditions made subsequently to the demise under which the bankrupt holds the premises, *Maples v. Pepper, supra.*]

This statute applies only to cases arising between lessor and lessee, it does not apply to the case of the assignee of a lease becoming bankrupt, *Manning v. Flight*, 3 B. & Ad. 211; *Taylor v. Young, Ibid.* 521. In the former case the plaintiffs, as devisees of John Manning, brought covenant for rent against the defendants as lessees, who pleaded that they assigned to one W. P. B., who afterwards became a bankrupt; that the arrears of rent sued for fell due after the date of his commission; that the assignees declined the lease, and that the bankrupt within fourteen days delivered it up to the plaintiffs. The plaintiffs replied, that they did not accept it, and, upon de-

murrer, the court held, that the plea was bad—"If," said Little-dale, J., "before the statute there had been an assignment of the lease, and the lessors had accepted rent from the assignee, they might, notwithstanding, have proceeded by covenant against the lessees, the privity of contract not being destroyed. The 6 G. 4, c. 16, s. 75, makes no difference in this respect: *it contemplates the case of a bankrupt lessee only, not of an assignee of the term.* The statute operates only as a personal discharge of the bankrupt, for it does not say that the lease and covenants shall be at an end, but merely that the bankrupt lessee shall not be liable to be sued in respect of any subsequent non-observance of the covenants." In *Ex parte Vardy*, 3 M. D. & D. 345, the statute was applied by Knight Bruce, V. C., to a case where the lease was in the hands of an equitable mortgagee; and in *Ex parte Norton, Ibid.* 312, to a case where one of two lessors was in partnership with the tenant, and by the partnership articles the lease was agreed to be partnership property. The language of the [12 & 13 Vict. c. 106,] is somewhat different from that of the 6 G. 4, cc. 76 and 77, but the effect of it in this respect seems to be the same.

There can be no apportionment of rent under these sections, so as to make the bankrupt liable to what accrued previous to the

bankruptcy, *Slack v. Sharpe*, 8 A. & E. 366.

When the assignees accept the lease, the discharge of the bankrupt is so complete, that even though he should afterwards come in as the assignee of his own assignees, he will incur no greater liabilities than any other person would in the same character, *Doe d. Cheere v. Smith*, 5 Taunt. 800. But a surety for a lessee is liable for breaches of covenant which occurred after the date of a commission of bankruptcy against the lessee, but before the delivery up of the lease by the bankrupt to the lessor under 6 G. 4, c. 16, s. 75; for even assuming that delivery up to operate as a surrender, still the surrender of the lease could not be held to relate back to the date of the *fiat* or commission, *Tuck v. Fyson*, 6 Bing. 331.

Wherever the provisions of the 12 & 13 Vict. c. 106, s. 145, do not apply, (and there are several cases besides that of the assignee of a lease to which they would probably be held inapplicable; for instance, they would probably be held not to include the case of a lessee becoming bankrupt after having made an under-lease,) in all such cases recourse must be had to the doctrines established in *Mills v. Auriol* and *Copeland v. Stephens*, in order to ascertain the extent of the bankrupt's liability.

In cases where the provisions of the act apply, the course to be pur-

sued by the bankrupt, in order to obtain his discharge, depends upon the adoption or non-adoption of the lease by his assignees; since if they adopt it, he has merely to remain quiescent: but if they decline it, he must then, within fourteen days after he has had notice of their election [see *Brocklehurst v. Lowe*, 7 E. & B. 176], deliver the lease up to the lessor;—and, in cases where the provisions of the act do not apply, the extent of the bankrupt's liability also depends upon the adoption or rejection of the lease by the assignees. It has frequently, therefore, become important to inquire what acts on the part of the assignees amount to an adoption of the lease; and the general rule upon this subject is, that any intermeddling with the estate in the capacity of owner amounts to an adoption of it; but that a mere experiment to ascertain its value has not such an effect. Thus, where the assignees put up the lease to sale, and accepted a deposit from the purchaser, they were held to have adopted it, *Hastings v. Wilson*, Holt, 290. See also *Hanson v. Stevenson*, 1 B. & Ad. 208; *Welsh v. Myers*, 4 Camp. 368; *Hancock v. Welsh*, 1 Camp. 347; *Thomas v. Pemberton*, 7 Taunt. 206; *Clarke v. Hume*, 1 R. & M. 207; *Page v. Goddler*, 2 Stark. 309; *Gibson v. Courthorpe*, 1 D. & R. 205. But in the case of *Turner v. Richardson*, 7 East, 335, the assignees never entered

on the premises: and the question was, whether the putting up the lease to sale by auction was a taking possession; the court held that it was not so, it being a mode used by the assignees for ascertaining whether it was advisable for them to take possession or no. See *Wheeler v. Bramah*, 3 Camp. 340; *Hill v. Dobie*, 8 Taunt. 325; *Lindsay v. Limbert*, 12 Moore, 209. [In *Goodwin v. Noble*, 8 E. & B. 587, they did enter and take possession, and they put up the premises for sale and submitted to a distress, and paid the rent, but the court, having regard to the purposes for which these acts appeared to have been done, and also to the improbability under the circumstances that they should have taken to the lease, or have been understood by the lessor to have done so, held that the term had not vested in them. In the judgment of the court the result of the authorities upon this subject is stated to be, "that the assignees of the bankrupt are not liable as assignees of the term, unless they have done some act which unequivocally indicates to the lessor that they have elected to take the benefit of the lease. No general rule can be laid down as to the effect of remaining in possession of the demised premises, or paying rent for them, or doing any other act consistent with the supposition that the assignees have not elected to take the lease as part of the property

of the bankrupt for the benefit of the creditors. Each case must be determined by the peculiar circumstances belonging to it: and an examination of the decisions is only useful to get at the general principle by which they are governed."

The election given by the act to the assignees to take the lease ought to be made within a reasonable time, *Mackley v. Pattenden*, 1 B. & S. 178; S. C., 30 L. J. Q. B. 225.]

If the assignees adopt the lease they may exonerate themselves from all liabilities by assigning it over, in the same way as an ordinary assignee may, *Onslow v. Corrie*, 2 Madd. 330.

[In "The Bankruptcy Act, 1861," 24 & 25 Vict. c. 134, (which repeals part, but not s. 145, of 12 & 13 Vict. c. 106, and is to be construed together with the rest of that act as one statute,) there is a provision (s. 131) giving the assignees an election to take the lease, or agreement for lease, and keep possession of the premises up to some quarter or half-yearly day (not later than six months from the adjudication) on which the rent is payable, and upon that day to decline to accept it.] There [were] provisions in the insolvent acts, 1 & 2 Vict. c. 110, s. 50, and 7 & 8 Vict. c. 96, s. 12, similar to those of the bankrupt law regarding leases; and it was held upon the construction of 1 G. 4, c. 119, one of the old insol-

vent acts, that where the assignee had accepted the lease, and acted as tenant, his executor (no new assignee having been appointed) was liable for breaches subsequent to the testator's death, *Abercrombie v. Hickman*, 8 A. & E. 687. See, as to the effect of an assignment under the old insolvent act, *Lindsay v. Limbert*, 12 Moore, 209; S. C., 2 C. & P. 526; *Doe d. Palmer v. Andrews*, 12 Moore, 601; S. C., 4 Bing. 348; *Tophan v. Dent*, 6 Bing. 515; S. C., 4 Moo. & P. 264; which suggest a possible distinction between the effect

of a bankruptcy and an insolvency upon terms of years belonging to the bankrupt or insolvent. [It is barely now worth mentioning that the existence of such a distinction was negatived in *Bishop v. The Trustees of the Bedford Charity*, Cam. Scac., 1 El. & El. 697; 29 L. J. Q. B. 53; since all the insolvent acts, excepting a few sections, not including those above referred to, have been repealed by "The Bankruptcy Act, 1861," 24 & 25 Vict. c. 134, which subjects all classes of debtors to the existing law of bankruptcy.]

MASTER v. MILLER.

TRINITY.—31 GEO. 3., K. B. & CAM. SCACC.

[REPORTED 4 T. R. 320, AND 2 HEN. BL. 140.]

An unauthorised alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration.[†]

[†] See *Hutchins v. Scott*, 2 M. & W. 809, where an agreement which had been altered while in the custody of the person producing it was held admissible in evidence for some purposes.

THE first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor; it stated that Peel and Co., on the 20th of March, 1788, drew a bill for 974*l.* 10*s.* on the defendant, payable three months after date to Wilkinson and Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts: for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

Special verdict.

It stated that Peel and Co., on the 26th March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson and Cooke, for 974*l.* 10*s.*, “which said bill of exchange, made by the said Peel and Co., as the same hath been altered, accepted, and written upon, as hereinafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following; *to wit*, ‘June 23rd, 974*l.* 10*s.*, Manchester, March 20, 1788, three months after date pay

to the order of Messrs. Wilkinson and Cooke 974*l.* 10*s.*, Special verdict.
 received, as advised, Peel, Yates, and Co. To Mr. Cha.
 Miller, C. M. 23rd June, 1788.' That Peel and Co.
 delivered the said bill to Wilkinson and Cooke, which the
 defendant afterwards and before the alteration of the bill
 hereinafter mentioned accepted, that Wilkinson and Cooke
 afterwards indorsed the said bill to the plaintiffs for a
 valuable consideration before that time given, and paid
 by them to Wilkinson and Cooke for the same. That
 the said bill of exchange, at the time of making thereof
 and at the time of the acceptance, and when it came to
 the hands of Wilkinson and Cooke, as aforesaid, bore
 date on the 26th day of March, 1788, the day of making
 the same; and that after it so came to and whilst it
 remained in the hands of Wilkinson and Cooke, the said
 date of the said bill, without the authority or privity of
 defendant, was altered by some person or persons to the
 jurors aforesaid unknown, from the 26th day of March,
 1788, to the 20th day of March, 1788. That the words
 'June 23rd,' at the top of the bill, were there inserted to
 mark that it would become due and payable on the 23rd
 of June next after the date; and that the alteration here-
 inbefore mentioned, and the blot upon the date of the bill
 of exchange, now produced and read in evidence, were on
 the bill of exchange when it was carried to and came
 into the hands and possession of the plaintiffs. That the
 bill of exchange was on the 23rd of June, and also on the
 28th of June, 1788, presented to the defendant for pay-
 ment; on each of which days respectively he refused to
 pay." The verdict also stated that the bill so produced
 to the jury and read in evidence was the same bill upon
 which the plaintiffs declared, &c.

This case was argued in Hilary Term last, by *Wood* for
 the plaintiffs, and *Mingay* for the defendant; and again on
 this day by *Chambre* for the plaintiffs and *Erskine* for the
 defendant.

For the plaintiffs it was contended that they were
 entitled, notwithstanding the alteration in the bill of
 exchange, to recover, according to the truth of the case,

Argument for
 the plaintiffs.

Argument for
the plaintiffs.

which is set forth in the second count of the declaration, namely, upon a bill dated the 26th March; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, and had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part, and upon a supposed analogy between those instruments and bills of exchange; but upon investigating the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills: and if that be shown, the objection founded on the supposed analogy between them must fall with it. The general rule respecting deeds is laid down in *Pigot's Case* (a), where most of the authorities are collected; from thence it appears, that if a deed be altered in a material point, even by a stranger, without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. Now that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instruments not executed with the same solemnity. There are many forms requisite to the validity of a deed, which were originally of great importance to mark the solemnity and notoriety of the transaction; and on that account the grantees always were, and still are, entitled to many privileges over the holders of other instruments. It was therefore reasonable enough that the party in whose possession it was lodged, should, on account of its superior authenticity, be bound to preserve it entire with the strictest attention, and at the peril of losing the benefit of it in the case of any material alteration even by a stranger; and that he is the better enabled to do from the nature of the instrument itself, which, not being of a negotiable nature, is not likely to meet with any mutilation, unless through the fraud or negligence of the owner;

(a) 11 Co. 27.

whereas bills of exchange are negotiable instruments, and are perpetually liable to accidents in the course of changing hands, from the inadvertence of those by whom they are negotiated, without any possibility of their being discovered by innocent indorsees, who are ignorant of the form in which they were originally drawn or accepted; and the present is a strong instance of that; for the plaintiffs cannot be said to be guilty of negligence in not inquiring how the blot came on the bill, which mere accident might have occasioned. That the same reasons upon which the decisions of the courts upon deeds have been grounded, will not support such judgments upon bills, will best appear by referring to the authorities themselves. When a deed is pleaded, there must be a *profert in curiam* (a), unless, as in *Read v. Brookman* (b), it be lost or destroyed by accident, which must however be stated in the pleadings. The reason of which is, that anciently the deed was actually brought into court for the purpose of inspection; and if, as is said in 10 Co. 92, b, the judges found that it had been rased or interlined in any material part they adjudged it to be void. Now, as that was the reason why a deed was required to be pleaded with a *profert*, and as it never was necessary to make a *profert* of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. So deeds, in which were erasures, were held void, because they appeared on the face of them to be suspicious, 13 Vin. Abr. tit. Faits, 37, 38; Bro. Abr. Faits, pl. 11, referring to 44 Edw. 3, c. 42. Nor could the supposition of fraud have been the ground on which that rule was founded with respect to deeds; for in Moore, 35, pl. 116, a deed which had been rased was held void, although the party himself who made it had made the erasure; which was permitting a party to avail himself of his own fraud: but it is impossible to contend that the rule can be carried to the same extent as to bills; nor is it denied but that if the blot here had been made by the acceptor himself, he would still have been bound. In Keilw. 162, it is said that if A. be bound to B. in 20*l*. and

Argument for
the plaintiffs.

(a) [Not so
now, C. L. P.
Act, 1852, s.
55.]
(b) 3 T. R.
151.

Argument for
the plaintiffs.

B. rase out 10*l.* all the bond is void, although it is for the advantage of the obligor ; and even where an alteration in a deed was made by the consent of both the parties, still it was held to avoid it, 2 Rol. Abr. 29, letter U, pl. 5 (Lord *Kenyon* observed that there had been decisions to the contrary since). Fraud could not be the principle on which those cases were determined : whereas it is the only principle on which the rule contended for can be held to extend to bills of exchange, but which is rebutted in the present case by the facts found in the special verdict. According to the same strictness, where a mere mistake was corrected in a deed, and not known by whom, it was held to avoid it, 2 Rol. Abr. 29, pl. 6 ; and it does not abate the force of the argument that the law is relaxed in these respects, even as to deeds, for the question still remains, whether at any time bills of exchange were construed with the same rigour as deeds ? The principle upon which all these cases relative to deeds were founded was, that nothing could work any alteration in a deed, except another deed of equal authenticity ; and as the party who had possession of the deed was bound to keep it securely, it might well be presumed that any material alteration even by a stranger was with his connivance, or at least through his culpable neglect. In many of the cases upon the alteration of deeds, the form of the issue has weighed with the court ; as in 1 Rol. Rep. 40, (which is also cited in *Pigot's Case*, 11 Co. 27,) and *Michael v. Scockwith*, Cro. El. 120, in both which cases the alteration was after plea pleaded ; and on that ground the court held it was still to be considered as the deed of the party on *non est factum*. Now the form of the issue in actions upon deeds and those upon bills is very different ; in the one case, the issue simply is, *whether it is the deed of the party*, which goes to the time of the plea pleaded ? as appears from the case before cited, and from 5 Co. 119, b, and Dy. 59 ; but here the issue is, *whether the defendant promised, at the time of the acceptance, to pay the contents ?* The form of the issue is upon his promise, arising by implication of law from the act of acceptance, which is

found as a fact by the special verdict agreeable to the bill declared on in the second count: and in no instance, where an agreement is proved merely as evidence of a promise, is the party precluded from showing the truth of the case. Not only therefore the forms of pleading are different in the two cases, but the decisions which have been made upon deeds, from whence the rule contended for as to erasures and alterations is extracted, are altogether inapplicable to bills. The reasons for such rigorous strictness in the one case, do not exist in the other. On the contrary, all the cases upon bills have proceeded upon the most liberal and equitable principles with respect to innocent holders for a valuable consideration. The case of *Minet v. Gibson* (a) goes much farther than the present: for there this Court, and afterwards the House of Lords, held that it was competent to inquire into circumstances extraneous to the bill, in order to arrive at the truth of the transaction between the parties; although such circumstances operated to establish a different contract from that which appeared upon the face of the bill itself; whereas the evidence given in this case, and the facts found by the special verdict, are in order to show what the bill really was; which it is competent for these parties to do against whom no fraud can be imputed, if any exist. If the blot had fallen on the paper by mere accident, it cannot be pretended that it would have avoided the bill; and *non constat* upon this finding that it did not so happen. Even if felony were committed by a third person, through whose hands the bill passed, although that party could not recover upon it himself, yet his crime shall not affect an innocent party, to whom the bill is indorsed or delivered for a valuable consideration. In *Miller v. Race* (b), where a bank-note had been stolen, and afterwards passed *bonâ fide* to the plaintiff, it was held that he might recover it *in trover* against the person who had stopped it for the real owner. And the same point was held in *Peacock v. Rhodes* (c), where the bill was payable to order. Again, in *Price v. Neale* (d), it was held that an acceptor, who had paid a forged bill to an innocent indorsee, could

Argument for
the plaintiffs.

(a) 3 T. R.
481, in B. R.,
and 1 H. Bl.
569, in Dom.
Proc.

(b) 1 Burr.
452 [ante, p.
468].

(c) Dougl. 633.

(d) 3 Burr.
1354.

Argument for
the plaintiffs.

not recover back the money from him. Now if it be no answer to an action upon a bill against the acceptor to show that it was a forgery in its original making by a third person's having feigned the handwriting of the drawer, still less ought any subsequent attempt at forgery, even if that had been found which is not, to weigh against an innocent holder. But it would have been impossible to have recovered in any of these cases if the deed had been forged in any respect, even by strangers to it; which shows that these several instruments cannot be governed by the same rules. And so little have the forms of bills of exchange and notes been observed, when put in opposition to the truth of the transaction, that in *Russell v.*

(a) Dougl. 514.

Langstaffe (a) the Court held, in order to get at the justice of the case, that a person, who had indorsed his name on blank checks, which he had entrusted to another, was liable to an indorsee for the sums of which the notes were afterwards drawn; and yet the form of pleading supposes the note to have been a perfect instrument, and drawn before the indorsement. But the case which is most immediately in point to the present, is that of *Price v. Shute*, E. 33 Car. 2, in B. R. (b); there a bill was drawn payable the 1st of January; the person upon whom it was drawn accepted it to be paid the 1st of March; the holder, upon the bill's being brought back to him, perceiving this enlarged acceptance, struck out the 1st of March, and put in the 1st of January; and then sent the bill to be paid, which the acceptor refused; whereupon the payee struck out the 1st of January, and put in the 1st of March again: and in an action brought on this bill, the question was, whether these alterations did not destroy it; and it was ruled they did not. This case therefore has settled the doubt; and having never been impeached, but on the contrary recognised, as far as general opinion goes, by having been inserted in every subsequent treatise upon the subject, it seems to have been acted on ever since. And it would be highly mischievous if the law were otherwise: for however negligent the owner of a deed may be supposed to be, who lets it out of his possession, the holder of a bill

(b) 2 Moll. c.
10, s. 28.

of exchange is by the ordinary course of such transactions obliged to trust it, even in the hands of those whose interest it is to avail themselves of this sort of objection. For it is most usual for the bill to be left for acceptance, and afterwards for payment, in the hands of the acceptor, who may be tempted to put such a blot on the date as may not be observed at the time, through the confidence of the parties. But even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents, upon the same principle as governed the case of *Read v. Brookman* (a)? where it was held that pleading that a deed is lost by time and accident, supersedes the necessity of a profert. But at any rate the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of *Tatlock v. Harris* (b); for though it is not expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

Argument for
the plaintiffs.

(a) 3 T. R.
151.

(b) 3 T. R.
174.

For the defendant it was contended, that the broad principle of law was, that any alteration of a written instrument in a material part thereof, avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only because formerly most written undertakings and obligations were in that form. This principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities: and it would be directly repugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity; which would be the case, if, after being detected in the attempt, he were not to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to enforce the rule with greater strictness as to the former; for it would be strange that because they were more open to fraud from the circumstance of passing through many hands, the law should relax and open a

Argument for
the defendant.

Argument for
the defendant.

(a) 11 Co. 27.

wider door to it than in the case of deeds, where fraud was not so likely to be practised. The principle laid down in *Pigot's Case* (a) is not disputed as applied to deeds. But the first answer attempted to be given is, that the rule as to deeds is *sui generis*, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this, it is sufficient to say that no such reason is suggested in any of the books ; but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given. Then it is said that there is a material distinction between the several issues in the two cases. But the difference is more in words than in sense; the substance of the issue in both cases is, whether in point of law the party be liable to answer upon the instrument declared on ? and therefore any matter which either avoids it *ab initio*, or goes in discharge of it, may be shown as much in the one case as in the other. Upon *non est factum* the question is, whether in law the deed produced in evidence be the deed of the party ? so on *non assumpsit* the question is, whether the bill given in evidence be in point of law the bill accepted by the defendant ? because the promise only arises by implication of law upon proof of the acceptance of the identical bill accepted, and given in evidence. Now neither of the counts in the declaration was proved by the facts found. For in the first count the bill is dated the 20th of March ; but as there is no evidence of the defendant's having accepted such a bill, of course the plaintiffs are not entitled to recover on that count. Neither can they recover on the second, because though it is found that he accepted a bill dated the 26th of March, as there stated, yet inasmuch as the bill stated to have been produced in evidence to the jury is dated the 20th, of course the evidence did not support the count. With respect to the cases cited of bills of exchange having been always construed by the most liberal principles, and particularly in the case of *Minet v. Gibson*, the same answer may be given

to all of them, which is, that so far from the original contracts having been attempted to be altered, all those actions were brought in order to enforce the observance of them in their genuine meaning against the party who, in the latter case particularly, endeavoured by a trick to evade the contract : whereas here the contract has been substantially altered by the parties who endeavour to enforce it ; or at least by those whom they represent, and from whom they derive title. Then the case in *Molloy, of Price v. Shute*, is chiefly relied on by the plaintiffs ; to which several answers may be given. First, the authenticity of it may be questioned ; for it is not to be found in any reports, although there are several contemporaneous reporters of that period. In the next place, the bill, as originally drawn, was not altered upon the face of it ; and therefore, as against all other persons at least than the acceptor, it might still be enforced. But principally it does not appear but that the action was brought against the drawer, who, as the acceptor had not accepted it according to the tenor of the bill, was clearly liable ; as the payee was not bound to abide by the enlarged acceptance, but might consider it as no acceptance at all. Then if this bill be void for this fraud, no evidence could be given to prove its contents, as in the case of a deed lost ; because in that there is no fraud. But even if any other evidence might have been given, it is sufficient to say that in this case there was none. And as to the common counts, if the general principle of law contended for applies to bills of exchange, it will prevent the plaintiffs from recovering in any other shape. Besides which, it is not stated that the defendant has received any consideration ; upon which ground the case of *Tatlock v. Harris* was decided.

Argument for
the defendant.

In reply it was urged, that the issue was not whether the defendant had accepted this bill in the state in which it was shown to the jury, but whether he had promised to pay, in consequence of having accepted a bill dated the 26th March, drawn by ? &c. ; and those facts being found, the promise necessarily arises. It is said that the policy

Reply.

Reply.

of the law will extend the same rule to the avoidance of bills of exchange which have been altered, as to deeds; because there is even greater reason to guard against fraudulent alterations in the former than in the latter case. To which it may be answered that the foundation of the rule fails in this case; for no fraud is found, and none can be presumed: and it is admitted, that if the blot had been made by accident, it would not have avoided the bill; and nothing is stated to show that it was not done by accident. Besides, the policy of the law is equally urgent in favour of the plaintiffs, it being equally politic to compel a performance of honest engagements. Here the defendant is only required to do that which in fact and in law he has promised to do. And if he be not liable on this contract, he will be protected in withholding payment of that money which he has received, and which by the nature of his engagement he undertook to repay. No answer has been given to the case cited from *Molloy*: for though the case is not reported in any other book, it bears every mark of authenticity, by noting the names of the parties, the court in which it was determined, and the time of the decision: and it has been adopted by subsequent writers on the same subject. Again, the alteration there was full as important as this, for it equally tended to accelerate the day of payment; and, lastly, it is not denied but that the action might have been maintained on the bill against any other person than the acceptor; which is an admission that the policy of the law does not attach so as to avoid such instruments upon any alteration, for otherwise it would have avoided the bill against all parties.

Judgments in
B. R.—Lord
Kenyon, C. J.

Lord *Kenyon*, C. J.—The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument?—for the instrument is the only mean by which they can derive a right of action. The right of action which subsisted in favour of *Wilkinson and Cooke*, could not be transferred to the

plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in *Molloy*, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar, which, in point of law as well as policy, ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why in point of policy, would it have had that effect in a deed? *Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected.* At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in the possession of Wilkinson and Cooke, who were then entitled to the amount of it; and from whom the plaintiffs derive title; and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they establish this principle, that all written instruments which were altered or erased should be thereby avoided. Then let us see whether the policy of the law, and some later

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(a) 2 Str. 747,
and 2 Lord
Raym. 1461.

cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George the First, in *Ward's Case* (a), whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other instruments as well as to deeds; and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from *Molloy* indeed, at first made a different impression on my mind: but on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party to whom it was directed, accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance; and on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, "that the alterations did not destroy the bill," it does not affect this case: not an iota of the bill itself was altered; but on the person to whom the bill was directed refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case; at least that none is found; but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of

saying, that a defendant is liable, on *non assumpsit*, if at any time he has made a promise, notwithstanding a subsequent payment: but the question is, whether or not the defendant promised in the form stated in the declaration? and the substance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

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Ashhurst, J.—It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson and Cooke; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them: at all events, it was their business to preserve the bill without any alteration. If Wilkinson and Cooke had brought this action they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody: then, if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs who derive title under them. For wherever a party takes a bill under such suspicious

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circumstances appearing on the face of it, it is his duty to inquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange which are daily circulated from hand to hand, should be preserved with greater purity than deeds which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

Buller, J.

Buller, J.—In a case circumstanced as the present is, in which it is apparent, as found, and has been proved beyond all doubt, that the bill of exchange in question was given for a full and valuable consideration, that the plaintiffs are honest and innocent holders of it, and that the defendant has the amount of the bill in his hands, it is astonishing to me that a jury of merchants should hesitate a moment in finding a verdict generally for the plaintiffs, more especially as I understand it was left to them by the Chief Justice to read the bill as it undoubtedly was drawn, and by that mean to put an end to the question at once. It was rightly so left to the jury by his Lordship; for that was the furtherance of the justice of the case, and it tended to prevent expense, litigation, and delay, which are death to trade. That the defendant cannot be suffered to pocket the money for which this bill was drawn, or to enable the drawer to do so, but that sooner or later, provided a bankruptcy do not intervene, it must be paid, I presume no man will doubt. The drawer has received the value, the plaintiffs have paid it, and the defendant has it in his hands. On this short statement, every one who hears me must

anticipate me in saying that the defendant must pay it. Nay, if actual forgery had been committed, the defendant could not be permitted to retain the money; he must not get 900*l.* by the crime of another; but, in such a case, I agree it would be difficult to sustain the present or any action for the money till something further had happened than has yet been done. The law, proceeding on principles of public policy, has wisely said—That where a case amounts to felony, you shall not recover against the felon in a civil action; but that rule does not appear by any printed authority to have been extended beyond actions of trespass or *tort*, in which it is said that the trespass is merged in the felony. That is a rule of law calculated to bring offenders to justice. But whether that rule extend to any case after the offender is brought to justice, or whether at any time it may be resorted to in an action between persons guilty of no crime, are questions upon which I have formed no opinion, because this case does not require it. Upon this special verdict, there is no foundation for saying that any one has been guilty of forgery, nor even of a fraud, as it strikes my mind. Fraud or felony is not to be presumed; and, unless it be found by the jury, the Court cannot imply it. *Minet v. Gibson* is a most decisive authority for that proposition, if any be wanted; and I do not think there is any foundation for the distinction attempted to be taken between that case and the present. It has been contended that the party there recovered, because the nature of the obligation was not altered: but the determination did not proceed entirely on that ground, but on this, that, according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer: so here the plaintiffs do not attempt to enforce the contract contrary to the terms of it, but according to that form by which the defendant originally consented to be bound, as stated in the second count. The special verdict finds that Peel and Co., on the 26th of March, 1788, drew a bill of exchange on the defendant for 947*l.* 10*s.*, payable to Wilkinson and Co.: which bill,

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as the same has been altered, accepted, and written upon, is set out *in hæc verba*. Upon the *fac-simile* copy of the bill set out in the verdict, there appears to be a blot over the date: and the jury have thought fit to read it as it now stands, the 20th. I must confess I should never have read it so; for seeing that there was something above the figure 0, that is the last reading which I should have given to it. I should have said on the face of the bill, this must have been either a 6 or an 8; it could not have been 8, because the 0 is as high as the 2, and therefore it must be a 6: but the jury have found no difficulty in saying it was a 6; and I will examine presently whether there be any objection to let it remain as a 6. The verdict further finds that the defendant, before any alteration of the bill, accepted it; and Wilkinson and Co. indorsed it to the plaintiffs, who paid a valuable consideration for it. Then it is stated, that whilst the bill was in the hands of Wilkinson and Cooke, the date, without the authority of the defendant, was altered by persons unknown, from the 26th to the 20th of March. They further find that the words "23rd of June" were inserted at the top of the bill, to mark that the bill would then become due; and that the alteration and the blot were on the bill when it was delivered to the plaintiffs. This is the full substance of the special verdict; and there is neither forgery, felony, nor fraud, found or supposed by the jury; we therefore can neither intend nor infer it. The verdict amounts only to saying there is a blot on the bill, but how it came there we don't know; and we beg to ask the Court whether the circumstance of a blot being on the bill which we cannot account for makes the bill void. Provided I have accurately stated the question, surely such a verdict is without precedent. Suppose a child had torn out a bit of the bill on which the top of the 6 was written, is the holder of the bill to lose his 974*l*.? or is the defendant to get 974*l*. by such an accident? But to decide whether I have accurately stated the question in the cause, it is necessary to examine the words of the special verdict minutely, and by

degrees. The jury have said that the bill was altered. The word "altered" may raise a suspicion and alarm in our minds; but let not our judgment be run away with by a word, without examining the true sense and meaning of it as it is used in the place where we find it. How was it altered, what was the alteration, when was it made, and for what purpose? The jury have said it was altered by means of putting a blot over the date: but by whom or when that was done we don't know, further than that it was done whilst the bill was in the possession of Wilkinson and Cooke: but we do not find that it was done for any bad purpose, or with any improper view whatever. Upon this finding, the Court are bound to say it was done innocently. But the jury have also said, that "June 23rd" was inserted at the top of the bill to mark when the bill would become due. When and by whom was that done? The jury have not said one word upon the subject. Was that done even during any part of the time whilst the bill was in the possession of Wilkinson and Cooke? No. It is consistent with the finding, that the plaintiffs, who are found to be *bond fide* holders of the bill, upon reading the date to be the 20th, and calculating the time which it had to run from that date, put down "June 23rd" with the most perfect innocence. If the bill had been originally dated on the 20th, the 23rd June would have been the true time of payment. But admitting that a wrong date had been put down, as denoting the time of payment, is there any case or authority which says that that circumstance shall render the bill void? Every bill which has been negotiated within the memory of man is marked by some holder or another with the day when it will become or is supposed to become due. That in some sense of the word is an alteration; for it makes an addition to the bill which was not there when it was drawn or accepted. But was it done fraudulently? The answer is—It was not, and therefore it is of no avail. So here the jury have not said it was done fraudulently, and therefore it affords no objection. When the jury have stated what the alteration is, and how it was

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made, namely, by making a blot, and having fixed no sinister or improper motive for so doing, it is the same as if they had said only "here is a blot on the bill." Suppose the jury had said in a few words that this bill was drawn, indorsed, and accepted, by the defendant, as the plaintiffs allege, but here is a blot upon it which makes the date look like the 20th instead of the 26th. The true answer would have been—Blot out the blot by your own understanding and conviction, and pronounce your verdict according to the truth of the case. It was nobly said in another place, (I heard it with pleasure, and thought it becoming the dignity of the person who pronounced it, and the place in which it was pronounced), "*That the law is best applied when it is subservient to the honesty of the case.*" And if there be any rule of law which says you cannot recover on any instrument but according to the terms of it, forlorn would be the case of plaintiffs. By the temperate rules of law we must square our conduct." The honesty of the plaintiffs' case has been questioned by no one; and therefore I should imagine the wishes of us all would have been in favour of their claim, provided we are not bound down by some stubborn rule of law to decide against them. Here again I must beg leave to resort to what was forcibly said in another place, upon a similar subject, and which I shall do as nearly in the words which passed at the time as I can: because they carried conviction to my mind; because they contain my exact sentiments, and because they are more emphatical than any which I could substitute in the place of them. "The question (it was said) is whether there be any rule of law so reluctant that it will not recede from words to enforce the intention of the parties. I believe there is no such rule. For half of a century there have been various cases which have left the question of forgery untouched. If a bill be forged, the acceptor is bound." Speaking of the case of *Stone v. Freeland*, it was said, "if any one say that case is not law, let him show why it is not so. Judges can only look to former decisions. This has been a rule in the commercial

world above 20 years." This reasoning seems to me to be sound and decisive, if it apply to the present case ; and to prove that it does apply, I need only quote the case, mentioned at the bar, of *Price v. Shute*, reported in Beaves's Lex. Mercat., tit. Bill of Exchange, pl. 222, and Moll 109. There a bill was payable 1st January, and the person to whom it was directed accepted it to pay on the 1st of March, with which the servant returned to his master, who, perceiving this enlarged acceptance, struck out the 1st of March and put in the 1st of January, and at that time sent the bill for payment, which the acceptor refused; whereupon the possessor struck out the 1st of January and inserted the 1st of March again. In an action brought on this bill, the question was whether these alterations did not destroy the bill ; and ruled by Lord Chief Justice *Pemberton*, that they did not. Now, on reading this case, I cannot consider it in any other light than as an action brought against the acceptor ; for it only states what passed between those parties. Here then is a rule which has prevailed in the commercial world for 110 years : it stands uncontradicted and unimpeached : it was decided by great authority ; and, as I take it, on deliberation. For when it is said to have been in B. R., that must either have been in this court, or on a case saved by Chief Justice *Pemberton*, for his own opinion : which was a common way of proceeding in those days. In that case the term "alteration" is used, and therefore we need not be frightened or alarmed at that word. The effect of the alteration was to accelerate the payment ; so it is here. But in one respect that case goes beyond the present ; for there the alteration was made by the plaintiff himself ; here it was not. It is true, in that case, when the plaintiff found he could not receive the money on the 1st of January, he altered it back to the 1st of March ; but if the first alteration vitiated the bill, no subsequent alteration could set it up against the acceptor without his consent. Here the plaintiffs have not re-altered the bill ; but they have acted a more honest part ; they have left the bill as it was to

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speaking for itself ; but they have treated it as a bill of the 26th of March ; they have proved that it was a bill of the 26th of March ; they demanded payment according to that date ; and the jury have found all these facts to be true. And it is material to consider what was the issue joined between the parties ; for there is a great deal of difference between the plea of *non est factum* and the present : here the question is, whether the drawer made such a bill, and whether the defendant accepted it ; and this is found by the jury. Then the case of *Price v. Shute*, in sense and substance, is a direct authority in point with the present ; though it varies in a minute and immaterial circumstance. The plaintiffs in treating the bill, and making a demand as they have done, seem to have followed the sober advice and directions given by Beawes in pl. 190 ; where he says, “ he that is possessor of a bill which only says ‘ pay,’ without mentioning the time when, or that is without a date, or not clearly and legibly written, payable some time after date, &c., so that the certain precise time of payment cannot be calculated or known, must be very circumspect, and demand the money whenever there is any probable appearance of the time being completed that was intended for its payment ; or that he can demonstrate any circumstance that may determine it, or make it likely when it shall be paid.” It is impossible that this writer could have supposed that the bill was rendered void by any blot, obliteration, or erasure : on the contrary, he tells you that it must be demanded in time, and that you may make out by circumstances or other evidence when it was, or was likely to be, payable. That has been made out by evidence in the present case. Upon this head I shall only add one authority more, which is Carth. 460, where a bill was accepted after a day of payment was elapsed. It was objected that it was impossible in such a case for the defendant to pay according to the tenor of the bill, and therefore the declaration was bad ; but the Court held it good, and said the effect of the bill was the payment of the money, and not the day of payment. So here the defendant having accepted this bill, whatever may be

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the construction as to the date, must pay the money. I hold that in this case there is no fraud either express or implied; and that as the plaintiffs have proved that they gave a valuable consideration for the bill, and that it was indorsed to them by those through whose hands it passed, their case is open to no objection whatever. But I will suppose for a moment, though the case do not warrant it, that Wilkinson and Cooke did mean a fraud; still I am of opinion that would not affect the case between the plaintiffs and the defendant. It is a common saying in our law-books, that *fraud vitiates everything*. I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect that the principle which I have mentioned is always applied *ad hominem*. He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree, that, as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and *bond fide* contract between two others. Even as between the parties themselves we must not forget the figurative language of Lord Chief Justice *Wilmot*, who said that "the statute law is like a tyrant; where he comes, he makes all void; but the common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest." 2 Wils. 351. If an alteration be made to effect a fraud, the alteration shall be laid out of the question; but still the contract shall exist to its original and honest purpose, and shall be carried into execution as if the fraud had never existed. A case somewhat similar to this is to be found in the book which I have before quoted, and which though not a binding legal authority, yet, where its propositions are founded on practice and good sense, is deserving of some attention. Beawes, tit. Bill of Exchange, pl. 135, says, "where the possessor of a bill

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" [By the
"Common
Law Procedure
Act, 1852,"
s. 55, it is
unnecessary to
make *profert*.]

payable to his order fails, and to defraud his creditors indorses it to another, who negotiates it, and effectually receives the value, indorsing it again to a third, &c., and though the creditors, having discovered the fraud, oppose it, yet the acceptant must pay it to him who comes to receive it, on proof that he paid the real value for it." But it has been contended that there is an analogy between bills of exchange and deeds, and that in the case of deeds any erasure or alteration will avoid the deed. In answer to this, first, I deny the analogy between bills of exchange and deeds, and there is no authority to support it. In the case of deeds, there must be a *profert*,* and, as we learn from 10 Co. 92 b., in ancient times the judges pronounced upon view of the deed, though Lord Coke says that practice was afterwards altered. But there never is a *profert* of a bill of exchange; the judges cannot determine on a view of that, but it must be left to a jury to decide upon the whole of the evidence, according to the truth of the case. Again, in the case of joint and several bonds the objection was founded on its being a substantial injury to the defendant; for if it were considered as a sole bond, the defendant would be answerable for the whole debt; but if it were a joint bond, he would be liable to only half or other proportionable part of it. So far in those days did the Court look into the equity of the case. But the blot on this bill is no injury to the defendant; he is not liable to pay till the bill became due, computing the time from the original date; then he must pay it: he alone is liable; and he never can be charged a second time on the bill. Secondly, it is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. In Palm. 403, a deed which had erasures in it, and from which the seal was torn, was held good, it appearing that the seal was torn off by a little boy. So in any case where the seal is torn off by accident after plea pleaded, as appears by the cases quoted by the plaintiffs' counsel. And in these days, I think even if the seal were torn off before the action brought, there would be no difficulty in framing a declara-

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tion, which would obviate every doubt upon that point, by stating the truth of the case. The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a *profert* of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it; when that is done, the deed or the *profert* must agree with that stated in the declaration, or the plaintiff fails. But a *profert* of a deed without a seal will not support the allegation of a deed with a seal. For these reasons I am of opinion that the plaintiffs are entitled to judgment on the second count, which is drawn upon the bill, stating it to bear date the 26th March.

But supposing there could be any doubt on this part of the case, I am also of opinion that the plaintiffs are entitled to their judgment on either of the two counts for money paid, or for money had and received. Here it is material to recall to our minds the facts found by the verdict. The bill produced to the jury was drawn for value, and was accepted by the defendant. He is not found to have no effects of the drawer's in his hands; and his accepting the bill imports, and is at the least *prima facie* evidence, that he had: and on this verdict he must be taken to have the amount in his hands. In Burr. 1675, *Aston, J.*, said, it is an admission of effects. By his acceptance he gave faith to the bill; and the plaintiffs, giving credit to that fact, have actually paid the value of the bill on receiving it. On this case the money paid by the plaintiffs is money paid for the use of the defendant; for the money was advanced on the credit of the defendant, and in consequence of his undertaking to pay the bill. Again, the money in the defendant's hands is so much money received by him for the use of the plaintiffs, who were holders of the bill when it became due. The defendant has got that money in his pocket, which in justice and conscience the plaintiffs ought to have, and therefore they are entitled to recover it in an action for money had and received.

In answer to this, it was in the last term suggested for

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* [See a curious
passage in
Termes de la
Ley, tit. Chose
in Action.]

† [The doctrine
that there can-
not be an as-
signment of a
debt has been
long ago ex-
ploded. See
Noy's Maxims,
p. 72; the
judgment in
*Balfour v. The
Sea, Fire, &
Life Assurance
Co.*, 3 C. B.,
N. S. 308.]

‡ [See the
judgment of
Lord Abinger,
in *Finden v.
Parker*, 11 M.
& W. 675,
682; 4 Kent
Comm. 10th
Ed., 531, note;
*Williamson v.
Henley*, 6
Bing. 299.]

consideration, whether this bill after the alteration were not a *chose in action*, which could not be assigned? It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned, or granted over to another. Co. Litt. 214 a., 266 a.; 2 Roll. 45, l. 40.* The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case.† In 2 Roll. Abr. 45 & 46, it is admitted that an obligation or other deed may be granted, so that the writing passes: but it is said that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster-hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance.‡ Bro. tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. That such doctrine repugnant to every honest feeling of the human heart should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made; and, amongst others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it; 2 Roll. Abr. 115; but in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a *chose in action*, and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198; 2 Cro. 180. Courts of equity from the earliest times thought the doctrine too absurd for them to adopt, and therefore they always acted

in direct contradiction to it; and we shall soon see that courts of law also altered their language on the subject very much. In 12 Mod. 554, the Court speaks of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and to which they must give their sanction and act upon. So an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in 1 Roll. Abr. 29; Sid. 212, and T. Jones, 222; and lastly, by all the judges of England in *Mouldsdale v. Birchall*, 2 Black. 820, though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted, that though the courts of law have gone the length of taking notice of assignments of *choses in action* and of acting upon them, yet in many cases they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving the shadow when the substance is gone; and that it is merely a shadow, is apparent from the later cases, in which the Court have taken care that it shall never work injustice. In *Bottomley v. Brooke*, C. B. Mich. 22 G. 3 (a), which was debt on bond, the defendant pleaded that the bond was given for securing 103*l.* lent to the defendant by E. Chancellor; and was given by her direction in trust for her, and that E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the Court. In *Rudge v. Birch*,† K. B. Mich. 25 G. 3 (b), on the same pleadings there was judgment for the defendant. And in *Winch v. Keeley*, K. B. Hil. 27 G. 3 (c), where the obligee assigned over a bond and afterwards became a bankrupt, the Court held that he might notwithstanding maintain the action. Mr. J. Ashurst said, "It is true that formerly courts of law did not take notice of an equity or a trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this Court have seen that the justice

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(a) 1 T. R. 621.

+ But these cases have been disapproved of. *Tucker v.*

Tucker, 4 B. & Ad. 745. And

see *Wake v.*

Tinkler, 16 E.

36, where Lord

Ellenborough

said, that the

doctrine laid

down in them

was rather to

be restrained

than extended.

[This is, how-

ever, at vari-

ance with the

policy of the

Second C. L.

P. Act, 1854.]

(b) 1 T. R.

622.

(c) *Ante*, 1 T.

R. 619.

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of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust, why should they not of an equity? It is certainly true that a *chose in action* cannot strictly be assigned; but this Court will take notice of a trust, and see who is beneficially interested." But admitting that on account of this quaint maxim there may still be some cases in which an action cannot be maintained by an assignee of a *chose in action* in his own name, it remains to be considered, whether that objection ever did hold or ever can hold in the case of a mercantile instrument or transaction. The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillan v. Van Mierop*, Lord *Mansfield* said, if a man agree to do what if finally executed would make him liable, as in a court of equity, so, in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use, it undoubtedly does not hold; that is, in the cases of bills of exchange, and policies of insurance. The first is the present case; and bills are assignable by the custom of merchants; so in the case of policies of insurance; till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was to make the policy in the name of the broker; and yet the owner of the goods maintained an action upon it. Circulation and the transfer of property are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned; and I will show you other cases in which the Court have allowed it: 1st, In *Fenner v. Mears*, where the defendant, a captain of an East Indiaman, borrowed 1000*l.* of Cox, and gave two Respondentia bonds, and signed an indorsement on the back of them, acknowledging that, in case Cox chose to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who

was allowed to recover the amount of them in an action for money had and received. *De Grey*, Chief Justice, in disposing of the motion for a new trial, said (a), Respondentia bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration, that upon such assignment the money which I have borrowed shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money in conscience, and, therefore, I think, entitled also at law: for the defendant has promised to pay any person who is entitled to the money. So in the present case, I say the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is by law bound to pay the money to any person who is entitled. The very nature and foundation of an action for money had and received is, that the plaintiff is in conscience entitled to the money; and on that ground it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here in the beginning of the last term on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of a plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere.—2ndly, *Clarke v. Adair*, sittings after Easter, 4 Geo. 3: Debray, an officer, drew a bill on the agent of a regiment payable out of the first money which should become due to him on account of arrears or non-effective money. Adair did not accept the bill, but marked it in his book, and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brought an action against Adair for money had and received. It was allowed by all parties that this was not a bill within the custom of merchants: but Lord *Mansfield* said that it is an assignment for valuable con-

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sideration, with notice to the agent; and he is bound to pay it. He said he remembered a case in Chancery, where an agent under the like circumstances had paid the money to the administrator, and was decreed notwithstanding to pay to the person in whose favour the bill was drawn.—3rdly, In *Israel v. Douglas*, C. B. East, 29 G. 3 (a), A. being indebted to B., and B. indebted to C., B. gave an order to A. to pay C. the money due from A. to B.; whereupon C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held that C. might maintain an action for money had and received against him. And Mr. J. *Heath* expressly said he thought in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received. This opinion was cited with approbation in the House of Lords in *Gibson v. Minet*. Lastly, I come to the case of *Tutlock v. Harris*, (3 T. R. 182,) in which Lord *Kenyon*, in delivering the judgment of the court, said it “was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill; and this will satisfy the justice of the case, without infringing any rule of law.” All these cases prove that the remedy will be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received. Let us not be less liberal than our predecessors, and even we ourselves, have been on former occasions. Let us recollect, as Lord Chief Justice *Wilmut* said in the case I have alluded to, that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justitiam*: and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending him to his writ of *subpœna*, if he can make that justice appear. The justice, equity, and good conscience of the case of these plaintiffs

can admit of no question ; neither can it be doubted but that the defendant has got the money which the plaintiffs ought to receive. For these reasons, I am of opinion that the plaintiffs are entitled to judgment on either of these three counts in the declaration, namely, on the count on the bill of exchange, stating the date to be the 26th ; or on the count for money paid ; or on the count for money had and received.

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Grose, J.—The only question in this case is, whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts. The first count is on a bill of exchange dated the 20th of March ; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March ; but the defendant objects to the plaintiffs' recovering on this count also, because the bill having been altered while it was in the hands of Wilkinson and Cooke, it is not the same bill as that which was accepted ; and that is the true and only question in the cause. My idea is, that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular *choses in action* to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson and Cooke to them, and that this was the bill which was presented when it became due. Now has all this been proved ? The bill was drawn on the 26th of March, payable at three months' date ; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date ; but afterwards the date was altered ; the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days : according to that alteration, the payment was demanded on the 23rd of June, which shows that the plaintiffs considered it as a bill drawn the 20th of March ; then the bill which was produced in evidence to the jury

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* In *Dr. Leyfield's case*, 10 Rep. 92, one of the reasons for requiring proffer of a deed is stated to be *that it be not rased or interlined in material points or places, and that the judges in ancient time did judge upon their view the deed to be void, but of late times have left that to be tried by the jury if the rasing or interlining were before delivery.* On similar principles a deed, the name of the grantee in which is introduced after delivery, is void. *Hibblewhite v. M'Morine*, 6 M. & W. 200. But if the grantee be sufficiently identified, such an addition as filling up a blank left for his Christian name will not hurt. *Eagleton v. Gutteridge*, 11 M. & W. 465. So filling in a blank with the date does not vitiate. *Keane v. Smallbone*, 17 C. B. 179.

was not the same bill which was drawn by Peel and Co., and accepted by the defendant; and here the cases which were cited at the bar apply. *Pigot's* is the leading case; from that I collect, that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and, 2ndly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds: * but it is said that that law does not extend to the case of a bill of exchange; whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says, that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This principle too appears to me as applicable to one kind of instrument as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for 100*l.*, and after acceptance the sum was altered to 1000*l.*: it is

not pretended that the acceptor shall be liable to pay the 1000*l.* : and I say that he cannot be compelled to pay the 100*l.*, according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that *Pigot's Case* only shows to what time the issue relates : but it goes further, and shows, that if the instrument be altered at any time before pleaded, it becomes void. It is true the court will inquire to what time the issue relates in both cases. Then to what time does the issue relate here ? The plaintiffs in this case undertook to prove everything that would support the *assumpsit* in law, otherwise the *assumpsit* did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused : but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill, which was accepted by the defendant, was not presented for payment ; the defendant's refusal was a refusal to pay another instrument : and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar, that the inquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance : but granting that he did so promise, that alone will not make him liable unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my lord on the case in *Molloy* : but the note of that case is a very short one ; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this court :

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‘it only appears that there was a point made at *Nisi Prius*, but not that it was afterwards argued here. But it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world; but that is much to be doubted; for if, after an alteration of this kind, it be competent to the court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions; and I conceive that keeping a strict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad consequences, because the party who has paid a value for the bill may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

Per curiam.

Judgment for the defendant.

MASTER V. MILLER, IN THE EXCHEQUER CHAMBER,
IN ERROR.

Argument for
plaintiff.

ON behalf of the plaintiff, *Wood* argued as follows: It has been contended, on the other side, in the court below, that the acceptor of the bill was discharged from his acceptance by the alteration of the date, though made without the knowledge of the holder: but no case has been cited to show, that an alteration, such as was made in the present instance, would vitiate a written instrument, except it were a deed. But there is a material difference between deeds and bills of exchange. Deeds seldom if ever pass through a variety of hands, and are not liable to the same accidents to which bills are, from

their negotiability, exposed. There is therefore good reason in the rule, which requires that deeds should be strictly kept, and which will not suffer the least alteration in them; but the same rule is not applicable to bills. In ancient times the court decided on the inspection of deeds, for which reason a profert was necessary, that they might see whether any rasure or alteration had taken place: but bills of exchange were always within the cognizance of the jury. The form of the issue on a deed, also, is different from that on a bill; in the one it is, that it is not then, *i. e.*, at the time of plea pleaded, the deed of the party; 11 Co. 27, a, *Pigot's Case*; but the issue on a bill is, that the defendant did not undertake and promise. Here the jury have expressly found that the defendant did accept the bill, and the promise arises by implication of law from the acceptance. An alteration in the date, subsequent to the acceptance, will not do away the implied promise. In *Price v. Shute*, "a bill was drawn payable the 1st of January; the person upon whom it was drawn accepts the bill to be paid the 1st of March; the servant brings back the bill; the master, perceiving the enlarged acceptance, strikes out the 1st of March, and puts in the 1st of January, and then sends the bill to be paid; the acceptor then refuses: whereupon the person to whom the monies were to be paid strikes out the 1st of January, and puts in the 1st of March again. In an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and ruled they did not." 2 Molloy, 109. In *Nicols v. Haywood*, Dyer, 59, it was holden in the case of a bond, that where the seal was destroyed by accident before the trial, the jury might find the special matter, and being after plea pleaded, it could not be assigned for error, but the plaintiff recovered. To the same point also is Cro. Eliz. 120, *Michael v. Stockwith*. So in the present case, it was competent to the jury to find the special matter, and an alteration in the bill, subsequent to the time of the acceptance, ought not to prevent the plaintiff from recovering. In *Dr. Leyfield's Case*, 10 Co. 92, b, it is said, "in great and notorious

Argument for
plaintiff.

Argument for
plaintiff.

extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that should appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses:” the casualty by fire is only put as an instance, for the principle is applicable to all cases of accident. Thus also in *Read v. Brookman*, 3 Term Rep. B. R. 151, a deed was pleaded as being lost by time and accident, without a profert: and the present case is within the reason and spirit of that determination.

Argument for
defendant.

Bearcraft, contra.—On principles of law and sound policy, the plaintiff ought not to recover. The reason of the rule, that a material alteration shall vitiate a deed, is applicable to all written instruments, and particularly to bills of exchange, which are of universal use in the transactions of mankind. And here there was a material alteration in the bill, inasmuch as the time of payment was accelerated. As to the case of *Price v. Shute*, it is but loosely stated, and that not in any book of reports; and it does not appear against whom the action was brought.

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Cam. Scac.

Lord Chief Justice *Eyre*.—I cannot bring myself to entertain any doubt on this case; and if the rest of the court are of the same opinion it is needless to put the parties to the delay and expense of a second argument. When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange and their passing through a variety of hands, the inference is directly the reverse of that which was drawn by the counsel for the plaintiff: there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if therefore courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might

take place, such as the addition of a cipher in a bill for 100*l.*, by which the sum might be changed to 1000*l.*, and the holder having failed in attempting to recover the 1000*l.*, might afterwards take his chance of recovering the 100*l.*, as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the defendant could not dispute the finding of the jury, that they found that he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of *non assumpsit* is,* not that he did not accept the bill, but that there was no duty binding on him at the time of plea pleaded (*a*). There are many ways by which the obligation of the acceptance might be discharged; for instance, by payment. And it was certainly competent to him to show, that the duty which arises *prima facie* from the acceptance of a bill, was discharged in the present case by the bill itself being vitiated by the alteration which was made.

Lord Chief Baron *Macdonald*.—I see no distinction as to the point in question between deeds and bills of exchange: and I entirely concur with my Lord Chief Justice, in thinking there would be more dangerous consequences follow from permitting alterations to be made on bills than on deeds.

The other judges declared themselves of the same opinion.

Judgment affirmed.

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* [This plea is not now pleadable to a count on a bill of exchange, R. G. T. T. 1853. The proper plea to raise the question is *non accepit* (sometimes improperly called *non accepit*) where the altered bill is declared upon, and a special plea of the alteration where the original bill is declared upon. See post, 837.]
(*a*) See Dougl. 111 & 112, Svo. *Sullivan v. Montague*, and the notes there.

SINCE the decision of this case it never has been doubted that a material alteration in a bill or note not satisfactorily accounted for operates as a satisfaction thereof, *except as against parties consenting* to such alteration. In *Alderson v. Langdale*, 3 B. & Ad. 660, the doctrine was carried still further,

and it was held that such an alteration made by the plaintiff operated as a satisfaction not only of the bill, but of the debt which it was given to secure. In *Alderson v. Langdale*, the debtor was the drawer of the bill altered; but in *Atkinson v. Hawdon*, 2 A. & E. 628, it was held that where the

debtor, being himself the maker or acceptor, could have had no remedy on the instrument against any other party to it, his liability to pay the debt secured thereby would not be extinguished by the alteration. In that case the declaration, so far as is material to this point, was for goods sold and delivered, and on an account stated. *Plea*, that the defendant accepted a bill at two months for the debt; *Replication*, that it was not paid when due; *Rejoinder*, that the plaintiff had altered it without the defendant's assent. *Demurrer*, and judgment for the plaintiff, the defendant's counsel admitting that the rejoinder could not be supported. It is obvious that this case has no bearing upon the effect of such an alteration in an action on the bill itself.

Alterations in the date, sum, or time for payment, or the insertion of words authorising transfer or expressing the value to be received on some particular account, adding the name of a maker or drawer, or an unwarranted place for payment, are *material* alterations within the aboverule. See *Walton v. Hastings*, 4 Camp. 223, 1 Stark. 215; *Outhwaite v. Luntly*, 4 Camp. 179; *Bowman v. Nicholl*, 5 T. R. 537; *Cardwell v. Martin*, 9 East, 190; *Kershaw v. Cox*, 3 Esp. 246; *Knill v. Williams*, 10 East, 431; *Clark v. Blackstock*, Holt, N. P. 474; *Tidmarsh v. Grover*, 1 M. & S. 735; *Cowie v. Halsall*, 4 B. & Ad. 197; *R. v. Treble*, 2 Taunt. 328;

Alderson v. Langdale, 3 B. & Ad. 660; *Taylor v. Mosely*, 6 C. & P. 278; *Crotty v. Hodges*, 4 M. & Gr. 561, 5 Scott, N. R. 221, S. C.; *Harrison v. Cotgreave*, 4 C. B. 562, where the defendant pleaded his infancy at the time of the alteration (not stating it to have been made without his consent), and that he had not ratified the contract as altered after he came of full age; *Mason v. Bradley*, 11 M. & W. 590, where the name of one of the makers of a promissory note was cut off; [*Warrington v. Early*, 2 E. & B. 763, where the addition was of the words "interest at six per cent. per annum," in the corner of a note for the payment of a sum "with lawful interest;"] *Burchfield v. Moore*, 3 E. & B. 683, where a place of payment was added to the acceptance, and the acceptor was held not to be liable even to a *bond-fide* holder for value [and *Hirschfeld v. Smith*, 1 Law R. C. P. 340, S. C.; 35 L. J. C. P. 177, where an addition was made of the rate of exchange at which a bill drawn on Paris was to be paid.] If the alteration be material, it makes no difference that it would operate, if at all, to the benefit of the maker. *Gardner v. Walsh* [5 E. & B. 83], 24 L. J. 285 [S. C.], overruling *Catton v. Simpson*, 8 A. & E. 136.

Even if the alteration be made *with the consent* of all the parties to the bill or note; still, as it thereby becomes a new contract,

the old stamp will not suffice, *Bowman v. Nicholl*, 5 T. R. 537; [*Batle v. Taylor*, 15 East, 412;] unless, indeed, the alteration was merely to correct a mistake, and so render the instrument what it was originally intended to have been. *Kershaw v. Cox*, 3 Esp. 246; *Jacob v. Hart*, 6 M. & S. 142; *Clark v. Blackstock*, Holt, N. P. 474; *Byron v. Thomson*, 11 A. & E. 316; *Cariss v. Tattersall*, 3 Scott, N. R., 257, 2 M. & G. 890, S. C., which see as to the evidence sufficient to prove an assent to the alteration; *Wright v. Inshaw*, 1 Dowl. N. S. 802; [The intent of the alteration is a question for the jury; *Byles on Bills*, 9th Ed. 314.] The addition of a new contractor with the assent of all parties does not hurt, according to *Zouch v. Clay*, 1 Vent. 185, 2 Lev. 35, S. C.; [or where he was originally intended to be added, *Dodge v. Pringle*, 29 L. J. Exch. 115;] and according to *Catton v. Simpson*, 8 A. & E. 136, 3 N. & P. 248, S. C., the addition of a contracting party without consent is merely inoperative, but according to the later authority of *Gardner v. Walsh*, *supra*, it vitiates the instrument. [In *Ex parte Yates*, 2 De G. & J. 191, 27 L. J., Bank. 9, S. C., the executor of the payee of a promissory note, forbore, at the request of one of the makers, to press for payment of it on his procuring additional security, and accordingly another party placed his name on the note, not under the

signatures of the makers but in the opposite corner. The Lords Justices held the addition to be not an alteration but an indorsement.]

An alteration made with the consent of parties *before a bill or note has issued* is of no importance, for, up to the time of issue, it is *in fieri*; *Downes v. Richardson*, *Bayley on Bills*, 5th Ed. 116; *Johnson v. D. of Marlborough*, 2 Stark. 313; so when made by an agent of all parties. *Sloman v. Cox*, 5 Tyrw. 175, 1 C. M. & R. 471, S. C. And a bill or note is said to be *issued* when it is in the hands of some party entitled to make a claim upon it. *Downes v. Richardson*, *ubi supra*; *Cardwell v. Martin*, 9 East, 190; *Kennersley v. Nash*, 1 Stark. 452.

If a bill or note exhibit the appearance of alteration, it lies upon the holder to account for it. *Henman v. Dickenson*, 5 Bing. 183; *Bishop v. Chambre*, 1 M. & M. 116; *Knight v. Clements*, 8 A. & E. 213; *Clifford v. Lady Parker*, 2 M. & G. 909, 3 Scott, N. R. 233, S. C. [See the observations as to this in *Byles on Bills*, 9th Ed. 316.] Whether an interlineation like an alteration raises a *prima facie* case of suspicion, so that the onus of explaining it is thrown upon the party producing the instrument, see 2 Wms. Saund. 200 c. n. (b). It has been laid down by the Court of Queen's Bench that although in the case of a bill of exchange there is a

distinct rule that an alteration must be explained, yet that in the case of a deed the presumption is that the alteration was made before execution. *Doe d. Tatum v. Catomore*, 16 Q. B. 745; *Contrà* of a will, because that may be altered by the testator, without wrong, after it is executed. *Doe d. Shalcross v. Palmer*, 16 Q. B. 747. [*Accord. Christmas v. Whinyates*, 3 Sw. & Tr. 81; 32 L. J. Prob. 73, where the same principle was applied to the case of a mutilation of a will.] *Quære* whether the distinction between an alteration and an interlineation was much considered in *Doe d. Tatum v. Catomore*.

A cancellation *by mistake* does not affect the liability of the parties whose signatures are cancelled. *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Novelli v. Rossi*, 2 B. & Ad. 765. *Accord. Warwick v. Rogers*, 5 M. & G. 352, 6 Scott, N. R. 1, S. C., where an unsuccessful attempt was made to fix a banker who had made such a cancellation, with the amount of the bill. [See as to mistake annulling the cancellation of a deed, *Perrott v. Perrott*, 14 East, 423. "If the absence of *intention* to cancel be clearly shown, the thing is not cancelled." *Bamberger v. The Commercial &c. Co.* 15 C. B. 693, *per* Maule, J.] Nor does the addition of a thing perfectly immaterial. *Catton v. Simpson*, 8 A. & E. 136.

When an *acceptance* is altered by inserting a place of payment, without adding the words "there only," or "not elsewhere," the alteration is, in an action against the acceptor, immaterial if made by his consent, st. 1 & 2 G. 4, c. 78, having rendered the above words necessary in order to a special acceptance. *Walter v. Cubley*, 2 C. & M. 151. But if made without his sanction, it avoids the bill, being the unauthorised appointment of an agent to pay the bill. *Taylor v. Moseley*, 6 C. & P. 278; *Macintosh v. Haydon*, R. & M. 362; *Desbroue v. Wetherby*, 1 M. & Rob. 438; *Calvert v. Baker*, 4 M. & W. 417; *Crotty v. Hodges*, 4 M. & G. 561; 5 Scott, N. R. 221, S. C. *Burchfield v. Moore*, 3 E. & B. 683.

Although for a long time *Pigot's Case*, 11 Rep. 26 a, and *Master v. Miller*, were the authorities always referred to upon questions of alteration, and although such questions seldom arose except in actions upon deeds, bills of exchange, and promissory notes, yet the doctrine of those two cases has been extended to other written instruments. In *Powell v. Divett*, 15 East, 29, the Court of Queen's Bench applied it to the case of bought and sold notes, and held that a vendor who, after the bought and sold notes had been exchanged, prevailed on the broker, without the consent of the vendee, to add a term to the bought note for his

the vendor's benefit, thereby lost all right against the vendee. The same law was acted upon in *Mollett v. Wackerbarth*, 5 C. B. 181. And in *Davidson v. Cooper*, 11 M. & W. 795, where to a count in *assumpsit* on a guaranty, the defendant pleaded that after it was given to the plaintiff, it was altered in a material particular *by some person to the defendant unknown*, without his consent, by affixing a seal so as to make it appear to be the deed of the defendant, and upon a motion of judgment *non obstante veredicto*, the Court of Exchequer reviewed and expounded the law upon the general subject of alteration, and holding the case to fall within the doctrine of *Pigot's Case*, gave judgment for the defendant. And that judgment was affirmed by the Court of Exchequer Chamber, "after much doubt," 13 M. & W. 343. The doubt at first entertained by the Court of Exchequer Chamber may however be considered as fortifying their ultimate decision, which was founded on the principle, "*that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state.*" "It is," said Lord Denman, in delivering the judgment, "highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to com-

plain, since there cannot be any alteration except through fraud or laches on his part." [*Davidson v. Cooper* was acted upon in *Croockewit v. Fletcher*, 1 H. & N. 893, in which case the instrument vitiated by alteration was a charter-party. See also *Fazakerly v. McKnight*, 6 E. & B. 795.]

An instrument which, by reason of an alteration, becomes invalid as the foundation of an action, is not however thereby necessarily avoided for all purposes. For instance, the alteration of a deed of conveyance, though it may deprive the covenantee of all right to sue upon the covenants therein contained, does not affect the ownership of the property conveyed; and the deed may, it seems, still be adduced in evidence, to show what was originally conveyed thereby. *West v. Steward*, 14 M. & W. 47. In such cases, to use the words of Lord Abinger, in delivering the judgment of the Court, in *Davidson v. Cooper*, 11 M. & W. 800, "the deed is produced merely as a proof of some right or title created by or resulting from its having been executed." [See *Green v. Attenborough*, Cam. Scac. 3 H. & C. 468; Exch. 88, S. C., where this distinction was adopted.] Also, in the *Earl of Falmouth v. Roberts*, 9 M. & W. 469, the rule as to the destructive effect of altering a written instrument was stated by Parke B., to apply where the obligation sought to be enforced

is by reason of the instrument. That was an action by landlord against tenant for mismanagement of a farm, and an instrument purporting to be a written agreement for the letting of the farm with stipulations as to the mode of tillage, though exhibiting an erasure and interlineation of the term of years not satisfactorily accounted for, was admitted as evidence of the terms upon which the defendant (who had become tenant from year to year under a contract, implied from the fact of occupation, to abide by all the terms of the written agreement applicable to a tenancy from year to year) held the premises. In that case the instrument given in evidence does not appear to have operated specifically as an agreement upon the terms of the existing tenancy; it did not contain the contract which the plaintiff sought to enforce; it was only part of the evidence to prove that such a contract existed, though not in writing; as such evidence, only that part of the written instrument which stated the mode of tillage was material, and that part had not been altered. It was like the printed paper in *Lord Bolton v. Tomlin*, 5 A. & E. 856, 1 N. & P. 247, S. C., with the additional circumstance that it was identified by the tenant's signature. In *Gould v. Coombes*, 1 C. B. 543, also, a promissory note, assumed to have been avoided as a contract by adding

the name of a maker, was yet admitted in evidence together with an "I O U" for the amount given whilst the note was valid, to sustain a count upon an account stated. In *Sutton v. Toomes*, 7 B. & C. 416, an altered promissory note was admitted in evidence to show the terms of deposit of money for which it had been given. In *The Agricultural Insurance Company v. Fitzgerald*, 16 Q. B. 432, the deed of settlement of the company was admitted in evidence to prove that the defendant was a shareholder, though the names of other shareholders, who signed before he did, had been erased since his execution of it. In *Hutchins v. Scott*, 2 M. & W. 809, likewise, an altered agreement was admitted in evidence for a collateral purpose; but some of the observations in that case must be taken subject to correction by *Davidson v. Cooper*. [See also *Stewart v. Aston*, 8 Irish C. L. Rep. 35, Cam. Scac.; *Reynolds v. Hall*, 28 L. J. Exch. 257. The cancellation of a lease with the mutual consent of the lessor and lessee, does not defeat the right of the former to recover the rent in an action of debt on the demise, *Lord Ward v. Lumley*, 5 H. & N. 87, and in such action the cancelled instrument is admissible in evidence for the plaintiff on the issue joined on a plea of non-demisit. *Same v. Same*, Ib. 656; 29 L. J. Exch. 322, S. C.]

Since the rules of H. 4 W. 4,

the effect of an alteration has frequently been obviated by the form of the pleadings, as in *Sibley v. Fisher*, 7 A. & E. 444, where the issue being on the indorsement of a bill only, an alteration in the date was held irrelevant. And in *Heming v. Trenery*, 9 A. & E. 926, where a contract had been interlined, and the plaintiff declared upon it as in its original state, the defendant, having pleaded *non assumpsit* only, was not allowed to rely upon the effect of the interlineation. That case has been approved and acted upon in *Mason v. Bradley*, 11 M. & W. 590; *Davidson v. Cooper*, 11 M. & W. 778; and *Parry v. Nicholson*, 13 M. & W. 778; from which it is clear that, where the count is framed upon the instrument in its original state, an alteration which does not render a new stamp necessary cannot be taken advantage of under a plea denying the contract. The case of *Calvert v. Baker*, 4 M. & W. 417, where, in an action upon a bill declared upon as it was originally accepted, the defendant was allowed under a plea denying the acceptance to rely upon an alteration of the bill, can only be sustained on the ground that a new stamp was rendered necessary by the alteration; (see *Parry v. Nicholson*, *supra*, per Parke, B.); and on examination that ground will perhaps be found untenable. Where, on the other hand,

the plaintiff declares upon the instrument as altered, there the defendant may raise any available defence arising out of the alteration under a plea denying the contract; for, either he has not authorised the alteration, and so, never having made any such contract as that declared upon, must succeed in substance; or if he has authorised it, his objection can only be the want of a fresh stamp, and that may be taken, on the production of the altered instrument to prove the issue. In pleading an alteration the defendant ought to show that it was in writing, *Harlen v. Clifton*, 1 Q. B. 522: that it was made after his contract was complete (as, for instance, in the case of the acceptor of a bill, by acceptance), *Langton v. Lazarus*, 5 M. & W. 629; and, either that it was made without his consent, or that it was of such a character as to render a new stamp necessary, and made under circumstances in which a new stamp could not legally be affixed; see *Bradley v. Bardsley*, 14 M. & W. 873, 3 Dowl. & L. 476, S. C. [The want of a stamp is, generally speaking, not pleadable; but it is pleadable that the instrument, though originally properly stamped, has been re-issued after payment by the party ultimately liable, contrary to the express prohibition of the stamp act, 55 Geo. 3, c. 184, *Lazarus v. Cowie*, 3 Q. B. 459.]

WAUGH v. CARVER, CARVER, AND GIESLER.

MICHAELMAS.—34 GEO. 3, C. B.

[REPORTED 2 H. BL. 235.]

A and B, ship-agents at different ports, enter into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they become liable, as partners, to all persons with whom either contracts as such agent, though the agreement provides that neither shall be answerable for the acts or losses of the other, but each for his own.

*He who takes the general profits of a partnership must, of necessity, be made liable to the losses.**

He who lends his name as a partner becomes, as against all the rest of the world, a partner.

* [This position is now untenable, see *Wheatcroft v. Hickman*, *post*, in *notd.*]

THIS action of *assumpsit* for goods sold and delivered, work and labour done, &c., was tried at *Guildhall*, before the Lord Chief Justice, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated—

Case.

That on the 24th February, 1790, the defendants duly executed articles of agreement, as follows:—"Articles of agreement indented, made, concluded, and agreed upon this twenty-fourth day of February, in the year of our Lord one thousand seven hundred and ninety, between Erasmus Carver and William Carver, of *Gosport*, in the county of *Southampton*, merchants, of the one part, and Archibald Giesler, of *Plymouth*, in the county of *Devon*, merchant,

of the other part. Whereas the said Archibald Giesler, Case.
some time since, received appointments from several of
the principal ship-owners, merchants, and insurers in
Holland, and other places, to act as their agent in the
several counties of *Hampshire*, *Devonshire*, *Dorsetshire*,
and *Cornwall*; and whereas the said Erasmus Carver and
William Carver have for a great number of years been
established at *Gosport* aforesaid, in the agency line, under
the firm of Erasmus Carver and Son, and hold sundry
appointments as consuls and agents for the *Danish* and
other foreign nations, and also have very extensive con-
nections in *Holland* and other parts of *Europe*; and
whereas it is deemed for their mutual interest and the
advantage of their friends, that the said Archibald Giesler
should remove from *Plymouth*, and establish himself at
Cowes, in the *Isle of Wight*: and the said Erasmus Carver
and William Carver, and the said Archibald Giesler, have
agreed that each should allow to the other certain por-
tions of each other's commissions and profits, in manner
hereafter more particularly mentioned and expressed.
Now, therefore, this agreement witnesseth, and the said
Archibald Giesler doth hereby for himself, his executors
and administrators, covenant, promise, and agree, to and
with the said Erasmus Carver and William Carver, their
executors and assigns, in manner following (that is to
say), that the said Archibald Giesler shall and will, when
required so to do by the said Erasmus Carver and William
Carver, remove from *Plymouth* and establish himself at
Cowes aforesaid, for the purpose of carrying on a house
there in the agency line, on his account; but in conse-
quence of the assistance and recommendations which the
said Erasmus Carver and William Carver have agreed to
render in support of the said house at *Cowes*, the said
Archibald Giesler doth covenant, promise, and agree, to
and with the said Erasmus Carver and William Carver,
that the said Archibald Giesler, his executors, admini-
strators, and assigns, shall and will well and truly pay or
allow, or cause to be paid or allowed to the said Erasmus
Carver and William Carver, their executors, administrators,

Case,

or assigns, one full moiety or half part of the commission agency to be received on all such ships or vessels as may arrive or put into the port of *Cowes*, or remain in the road to the westward thereof within the *Needles*, of which the said Archibald Giesler may procure the address, and likewise one full moiety or half part of the discount on the bills of the several tradesmen employed in the repairs of such ships or vessels; and as there have been, for a considerable time past, very general complaints made abroad of the malpractices and impositions that have prevailed at *Cowes* aforesaid, and it being a principal object of the said Erasmus Carver and William Carver to counteract and prevent such, the said Archibald Giesler doth further covenant, promise, and agree to and with the said Erasmus Carver and William Carver, that he the said Archibald Giesler shall and will use his utmost diligence and endeavours to prevent ships or vessels arriving at the east end of the *Isle of Wight*, from being carried past the port of *Portsmouth* to that of *Cowes*; and also to induce the mariners or commanders of such ships or vessels as may come in at the west end of the island through the *Needles*, whenever it is practicable and advisable, to proceed to *Portsmouth*, and there put themselves under the direction of the said Erasmus Carver and William Carver, and that he will consult and advise with the said Erasmus Carver and William Carver on and respecting the affairs of such ships or vessels as may put into and remain at the port of *Cowes* under the care of the said Archibald Giesler, and pursue such measures as may appear to the said Erasmus Carver and William Carver for the interest of the concerned. And whereas one of the causes of complaint before mentioned is the very heavy charge made at *Cowes* for the use of warehouses for depositing the cargoes of ships or vessels, the said Archibald Giesler doth also covenant, promise, and agree to and with the said Erasmus Carver and William Carver, that they the said Erasmus Carver and William Carver shall be at full liberty to engage warehouses at *Cowes* aforesaid, on such terms and in such manner as they may think proper, in which the

said Archibald Giesler shall not upon any grounds or pre-
tence whatsoever either directly or indirectly interfere. Case.
And the said Erasmus Carver and William Carver, for the
considerations hereinbefore mentioned, do hereby covenant,
promise, and agree to and with the said Archibald Giesler,
his executors and administrators, that they the said Erasmus
Carver and William Carver shall and will well and truly pay
or allow, or cause to be paid or allowed to the said Archibald
Giesler, his executors, administrators, or assigns, three fifth
parts or shares of the commission or agency to be received by
the said Erasmus Carver and William Carver, on account of all
such ships or vessels, the commanders whereof may, in consequence
of the endeavours, interference, or influence of the said Archibald
Giesler, proceed from *Cowes* to *Portsmouth*, and there put themselves
under the direction of the said Erasmus Carver and William Carver,
in manner hereinbefore mentioned, and likewise one and one-half
per cent. on amount of the bills of the several tradesmen employed
in the repairs of such ships or vessels, together with one-fourth
part of such sum or sums as may be charged or brought into
account for warehouse rent, on the cargoes of such ships or vessels
respectively; and also one-sixth part of such sum or sums as may
be charged or brought into account for warehouse rent on the cargoes
of such ships or vessels as may be landed at *Cowes* aforesaid: and
also that they the said Erasmus Carver and William Carver, their
executors, administrators, and assigns, shall and will well and truly
pay or allow, or cause to be paid or allowed unto the said Archibald
Giesler, his executors, administrators, or assigns, one-fourth part
or share of the commission or agency to be received by the said
Erasmus Carver and William Carver, on account of all such ships
or vessels that may arrive or put into the port of *Portsmouth*,
or remain in the limits thereof, under the care and direction of
the said Erasmus Carver and William Carver: and likewise one-half
per cent. on amount of the bills of the several tradesmen employed
in the repairs of such ships or vessels: and in order to prevent any misunder-

Case.

standing or disputes, with respect to the commission and discount to be paid and divided between the said Erasmus Carver and William Carver, and the said Archibald Giesler, and for the better ascertaining thereof, it is hereby mutually covenanted, declared, and agreed upon between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that one-fifth part of the commission or agency on each ship shall and may be first retained by the party under whose care such ship or vessel shall be, as a full compensation for clerks, boat hire and all the other incidental charges and expenses in regard of such ships or vessels respectively; after which deduction, the then remaining balance of such commissions or agency shall be divided between the said Erasmus Carver and William Carver, and the said Archibald Giesler, in the proportion hereinbefore mentioned; and that such commission or agency shall be ascertained by one party's producing to the other true and authentic copies of the general accounts of each ship or vessel under their respective care and direction, signed by the several masters of such ships or vessels respectively, and notarially authenticated. And it is hereby further covenanted, declared, and agreed upon by and between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that this present contract and agreement shall commence and take effect from the date hereof, and shall continue in full force and virtue for the term of seven years, during the whole of which said term the said parties, or either of them, shall not upon any grounds or pretence whatsoever, directly or indirectly, enter into, or form any connection, contract, or agreement with any other house or houses, or with any person or persons whatsoever, concerning the commission or agency of ships or vessels that may during the said term put into or arrive at either of the before-mentioned ports of *Portsmouth* or *Cowes*, nor shall the said Archibald Giesler at the expiration of the said term of seven years, directly or indirectly, establish himself at *Gosport* or *Portsmouth*, nor on any grounds or pretences whatsoever, enter into or

form any connection, contract, or agreement with any Case.
house or houses, person or persons whomsoever at *Gosport*
or *Portsmouth* aforesaid. And also that they the said
Erasmus Carver and William Carver, and the said Archi-
bald Giesler, shall and will meet at *Gosport* on or about
the first day of September yearly, for the purpose of
examining and settling their accounts, concerning the said
commission business, and that such party from whom the
balance shall then appear to be due, shall and will well
and truly pay or secure the same unto the other party,
his executors, administrators, or assigns, on or before the
twenty-ninth day of the said month of September yearly.
And it is hereby likewise covenanted, declared, and agreed,
by and between the said Erasmus Carver and William
Carver, and the said Archibald Giesler, that each party
shall separately run the risk of, and sustain all such loss
and losses as may happen on the advance of moneys in
respect of any ships or vessels under the immediate care
of either of the said parties respectively; it being the true
intent and meaning of these presents, and of the parties
hereunto, that neither of them, the said Erasmus Carver
and William Carver and Archibald Giesler, shall at any
time or times, during the continuance of this agreement,
be in any wise injured, prejudiced, or affected by any loss
or losses that may happen to the other of them, or that
either of them shall in any degree be answerable or
accountable for the acts, deeds, or receipts of the other of
them, but that each of them, the said Erasmus Carver
and William Carver and Archibald Giesler, shall in his
own person and with his own goods and effects respec-
tively be answerable and accountable for his own losses,
acts, deeds, and receipts. Provided always nevertheless,
and it is hereby declared and agreed to be the true intent
and meaning of these presents, and the parties hereunto,
that in case the houses of either of them the said Erasmus
Carver and William Carver and Archibald Giesler shall
dissolve or cease to exist, from any circumstance what-
soever, before the expiration of the said term of seven
years, that then this present agreement, and every clause,

Case. sentence, and thing herein contained, shall from thence cease, determine, and be absolutely void, to all intents and purposes whatsoever ; but without prejudice nevertheless to the settlement of any accounts that may then remain open and unliquidated between the said Erasmus Carver and William Carver, and the said Archibald Giesler, which shall be settled and adjusted within the space of six months next after the dissolution of the houses of either of them the said Erasmus Carver and William Carver and Archibald Giesler ; and also that at the expiration of the said term of seven years, it shall be at the option of the said Erasmus Carver and William Carver to renew this agreement for the further term of seven years, under and subject to the several clauses, covenants, and agreements hereinbefore particularly mentioned and set forth, which the said Archibald Giesler doth hereby engage to do. And it is hereby further covenanted, declared, and agreed, by and between the said Erasmus Carver and William Carver and Archibald Giesler, that these presents do not, nor shall be construed to mean to extend to such ships or vessels that may come to the address of either of the said parties respectively, for the purpose of loading or delivering any goods, wares, or merchandise, it being the true intent and meaning of these presents, and the parties hereunto, that the foregoing articles shall not, nor shall be construed to bear reference to their particular or separate mercantile concerns or connections ; and that in case any disputes or misunderstanding shall hereafter arise between them, respecting the true intent and meaning of any of the articles or covenants hereinbefore contained, that then such disputes or misunderstandings shall be submitted to the arbitration of two indifferent persons, one to be chosen by the said Erasmus Carver and William Carver, and the other by the said Archibald Giesler ; and in case such two persons cannot agree about the same, then they are hereby empowered to name some third person as an umpire ; and it is hereby declared and agreed, that the award and determination of the said referees and umpire,

or any two of them, concerning the object in dispute, Case. shall be made and settled within six calendar months next after such differences shall have arisen between the said parties, and shall be absolutely final, conclusive, and binding. And lastly, for the true performance of all and every the covenants, articles, and agreements hereinbefore mentioned, they the said Erasmus Carver and William Carver and Archibald Giesler do hereby bind themselves, their heirs, executors, and administrators, each to the other, in the penalty of five thousand pounds of lawful money of *Great Britain*, firmly by these presents."

In pursuance of these articles, Giesler removed from *Plymouth* and settled at *Cowes*, where he carried on the business of a ship-agent, in his own name, and contracted for the goods, &c., which were the subject of the action.

And the question was, whether the defendants were partners on the true construction of the article?

This was argued in Trinity Term last, by *Clayton*, Serjt., for the plaintiff, and *Rooke*, Serjt., for the defendants; and a second time in the present term by *Le Blanc*, Serjt., for the plaintiff, and *Lawrence*, Serjt., for the defendants. The substance of the arguments for the plaintiff was as follows:—

The question in this case is, Whether the articles of agreement entered into by the defendants constituted a partnership between them? That such was the effect of these articles will appear by considering the general rules of law respecting partners, and the particular circumstances in the case. The law is, that wherever there is a participation of profits a partnership is created; though there is a difference between a participation of profits and a certain annual payment. Thus in *Grace v. Smith*, 2 Black. 998, a retiring partner lent the other who continued in business a certain sum of money at 5*l.* per cent., and was to have an annuity of 300*l.* a year for seven years, the whole of which was secured by the bond of the partner who remained in trade. This was holden not to make the lender a partner; but Chief Justice *De Grey* there said—"The question is, What constitutes a secret

Arguments for
the plaintiff.

Arguments for
the plaintiff.

partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss; and if any one takes part of the profits, he takes a part of that fund on which the creditor of the trader relies for his payment. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson; or whether he only relied on those profits as a fund for payment?" And *Blackstone, J.*, also said—"The true criterion, when money is advanced to a trader, is to consider whether the profit or premium is certain and defined, or casual and indefinite, and depending on the accidents of trade. In the former case it is a loan, in the latter a partnership." In *Bloxam v. Pell*, cited in *Grace v. Smith*, a sum secured with interest on bond, and also an agreement for an annuity of 200*l.* a year for six years, if Brooke so long lived, as in lieu of the profits of the trade, with liberty to inspect the books, was held by Lord *Mansfield* to constitute a partnership. In *Hoare v. Dawes*, Dougl. 371, 8vo, a number of persons unknown to each other, and without any communication together, employed the same broker to purchase tea at a sale of the East India Company. The broker bought a lot, to be divided among them according to their respective orders, and pledged the warrants with the plaintiff, for more money than they turned out to be worth; on the broker becoming a bankrupt, the plaintiff sued two of the purchasers, considering them all as secret partners, and liable for the whole. But the Court held there was no partnership, and Lord *Mansfield* said—"There is no undertaking by one to advance money for another, nor any agreement to share with one another the profit or loss." In *Coope v. Eyre*, 1 H. Bl. p. 37, one of the defendants bought a quantity of oil of the plaintiffs, and the other defendants had agreed, before the purchase, each to take certain shares of the quantity bought; but, when bought, each to do with his own share as he pleased; they were holden not to be partners, for there was no share of profit or loss. In *Young v. Axtell* and another (a), which was an action to recover 600*l.* and upwards for coals sold and delivered

(a) At *Guildhall* sittings after Hil., 24 G. 3, cor. Lord *Mansfield*, cited by Mr. Serjt. Le Blanc, from a MS. note.

by the plaintiff, a coal-merchant, an agreement between the defendants was given in evidence, stating that the defendant Mrs. Axtell had lately carried on the coal trade, and that the other defendant did the same: that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2s. for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved, that bills were made out for goods sold to her customers in their joint names; and the question was, whether Mrs. Axtell was liable for the debt? Lord *Mansfield* said, "he should have rather thought on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not at the time of dealing know that she was a partner, or that her name was used" (b). And the jury accordingly found a verdict for the plaintiff.

Arguments for
the plaintiff.

It appearing, therefore, from these authorities, that a participation of profits is sufficient to constitute a partnership, it remains to be seen whether the agreement in question did not establish such a participation of the profits of the agency business between the defendants as to make them liable as partners. In the first place, it is stated in the recital, that the Carvers and Giesler had agreed to allow each other certain proportions of each other's commissions and profits. It is then agreed, that Giesler should, when required by the Carvers, remove from *Plymouth* to *Cowes*, and there establish a house: and in consequence of the Carvers' recommendation and assistance to support the house, Giesler is to allow them a moiety of the commission on ships putting into the port of *Cowes*, or remaining in the road to the westward, addressed to him, and a moiety of the discount on the tradesmen's bills employed on such ships: he also covenants to advise with the Carvers and pursue such mea-

(b) Sed quare;
vide the expres-
sions of *Park*,
J., in *Dickinson*
v. *Valpy*,
10 B. & C. 140.

Arguments for
the plaintiff.

asures as may appear to them to be for the interest of the concerned. On the other hand, the Carvers agree to pay Giesler three-fifths of the agency of all vessels which shall come from *Cowes* to *Portsmouth*, and put themselves under the direction of the Carvers, by the recommendation of Giesler, one-half per cent. on tradesmen's bills, and certain proportions of warehouse rent and agency. Each party is likewise to produce true copies of the accounts of the ships to the other, and neither is to form any other connection in the agency business during the period agreed upon; and they are to meet once a year at *Gosport* to settle their mutual accounts, and pay over the balance. Now it was not possible to express in clearer terms an agreement to participate in the profits of the business of ship agents, and to establish a joint concern between the two houses. It may be objected, that there is a proviso, that neither of the parties shall be answerable for the losses of the other; but this would certainly be not binding on the creditors. *Lord Craven v. Widdows*, 2 Chan. Cas. 139; *Heath v. Percival*, 1 P. Wms. 682; *Rich v. Coe*, Cowp. 636. An agreement to share profits alone, cannot prevent the legal consequence of also sharing losses, for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership, but it has been always holden, that where there is a share of profits, there shall also be a share of losses; for whoever takes a part of the capital, or of the profits upon it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have recourse. Thus, if in the year 1791 the profits were 100*l.*, and in the year 1792 there was a loss of 10*l.*, of course the profits of the preceding year would be the stock to which the creditor would resort for the payment of the debts which constituted part of the loss of the succeeding year. Indeed it is by no means necessary that, to constitute a partnership, the parties should advance money by way of capital; many joint trades are carried on with-

out any such advance : there is therefore no ground to object, in the present instance, that neither party brought any money into a common stock, in order to carry on their business.

Arguments for
the plaintiff.

On behalf of the defendants, the arguments were as follow : The question is, Whether this agreement creates such a partnership as to make all liable to the debts of each ? A partnership may be defined to be, "the relation of persons agreeing to join stock or labour, and to divide the profits." Thus Puffendorf described it, "*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo sane, ut quod inde redit lucri inter singulos pro ratâ dividatur,*" lib. 5, cap. 8. Partners, therefore, can only be liable on the ground of their being joint contractors, or as partaking of a joint stock. In many cases in which questions of this sort have arisen, and the persons have been holden to be partners, goods had been sold, and a common fund established, to which the creditor might look for payment ; and there it was highly reasonable to hold, that if many persons purchase goods on their joint account, though in the name of one only, and are to share the profits of a re-sale, they shall be considered as joint contractors, and therefore liable as partners. So if a joint stock or capital or joint labour be employed, each party is interested in the thing on which it is employed, and in the profits resulting from it. But in the present case, there is no joint contract for the purchasing goods, nor any joint stock or labour, but the parties are to share, in certain proportions, the profits of their separate stock, and separate labour : there was no house of trade or merchandise established, but two distinct houses, for the purpose of carrying on the business of ship agency, on two distinct accounts. The profits are not a capital, unless carried on as capital, and not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of

Arguments for
the defendants.

Arguments for
the defendants.

the other. So if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers who entered into similar agreements to share the produce of their separate labour, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships with which the parties were concerned, for such as came to the particular address of one were to be the sole profit of that one. It was indeed clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts, or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must therefore be a strong and invariable rule of law that can make the parties to the agreement responsible for each other, against their express intent. But all cases of partnership which have been hitherto decided have proceeded on one or other of the following grounds: 1. Either there has been an avowed authority given to one party to contract for the rest. 2. Or there has been a joint capital or stock. 3. Or, in case of dormant partners, there has been an appearance of fraud in holding out false colours to the world. Now the present case is not within either of those principles: because there was no authority given to either party to contract for the others; nor was there any joint capital or stock; nor were the public deceived by any false credit; no fraud is stated or attempted to be proved, nor can the court collect from the articles that any was intended: it was merely a purchase of Giesler's profits by giving him a share of those of the Carvers, to prevent a competition between them.

Judgment.

Lord Chief Justice *Eyre*.—This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether, by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bank-

ruptcy? But I think this case will not lead to that consequence (*). Judgment.

The definition of a partnership cited from *Puffendorf* is good as between the parties themselves, but not with respect to the world at large. If the question were between A. and B., whether they were partners or not, it would be very well to inquire, whether they had contributed, and in what proportion, stock or labour, and on what agreements they were to divide the profits of that contribution. But in all these cases a very different question arises, in which the definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. Now a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less, with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed between the Carvers and Giesler, that they were not, nor ever meant to be, partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be

* [But see now the 28 & 29 Vict. c. 86, s. 3, *post in notâ.*]

Judgment. involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not by parts of their agreement constituted themselves partners in respect to other persons? The case therefore is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done, is clear upon the face of the agreement: and upon the authority of

(a) 2 Black.
998.

Grace v. Smith (a), he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise: upon the principle that, *by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.* That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason (b). I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profit and loss: a ship agent employs tradesmen to furnish necessaries for the ship; he contracts with them, and is liable to them; he also makes out the bills in such a way as to determine the charge of commission to the ship-owners. With respect to the commission, indeed, he may be considered as a mere agent; but, as to the agency itself, he is as much a trader as any other man, and there is as much risk of profit and loss to the person with whom he contracts, in the transactions with him, as with any other trader. It is true that he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him, as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a

(b) [But see post, *Wheatcroft v. Hickman*, in notd. Before that decision, the principle laid down in *Grace v. Smith* was impugned with much learning by Mr. Lindley in his valuable treatise on the Law of Partnership, pp. 34—40. The actual decision in *Grace v. Smith* was that the defendant was not a partner.]

case clear of all difficulty. For though, with respect to Judgment. each other, these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.

Gould, J.—I am of the same opinion.

Heath, J.—I am of the same opinion.

Rooke, J., having argued the case at the bar, declined giving any opinion.

Judgment for the plaintiff (a).

(a) See *Coope v. Eyre*, 1 H. Bl. p. 37, and the note there.

PARTNERSHIP is either *actual* or *nominal*. *Actual partnership* takes place when two or more persons agree to combine property, or labour, or both, in a common undertaking, sharing profit and loss. "I have always," says Tindal, C. J., in *Green v. Beesley*, 2 Bing. N. C. 112, "understood the definition of partnership to be a mutual participation in profit and loss."

But with respect to third persons, an *actual* partnership [may] subsist where there is a participation in the *profits*, even though the participant may have most expressly stipulated against the usual incidents to that relation. (See *Bond v. Pittard*, 3 M. & W. 357.) Such stipulations will indeed hold good between himself and his companions, but will in no wise diminish his liability to third persons. [The principle on which this was supposed to be founded was,—to use the language

of the L. C. J. in the principal case,—that "by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts."

This principle, although some have thought it inexpedient as a restraint upon the employment of money in commerce, was for a long time upheld; but now both the legislature and the highest court of appeal have pronounced it to be vicious.

It is now settled, that there may be a participation in profits, yet no partnership, even *quoad* third persons. The real test of the liability of any one to third parties as a copartner is, whether or not the other person or persons conducting the business were his agents to carry it on. This was decided by the unanimous judgment of the House of Lords in *Wheatcroft and Cox v. Hickman*, 9 C. B. N. S. 47, 8 H. of L. C.,

268, 30 L. J. C. P. 125, S. C., overruling the authorities to the contrary, and reversing the decision in the same case of the Common Pleas, and of the Exchequer Chamber; in which latter court, however, the judges were divided in opinion, as also were the judges who delivered their opinions in the House of Lords. The facts of the case were these: Messrs. Smith, who were partners as iron merchants, at the Stanton Iron Works, became insolvent, and a deed of arrangement was executed between them and their creditors. By this deed Messrs. Smith conveyed all their property to five trustees upon trust, *to continue and carry on, under the name and style of the Stanton Iron Company, the business theretofore carried on by the Messrs. Smith in copartnership.* The deed then conferred upon the trustees powers to manage the works as they thought fit, and to renew leases, insure, erect buildings and machinery, appoint managers and agents, *enter into and execute all contracts and instruments in carrying on the business* (a provision clearly authorising the trustees to make or accept bills of exchange), and *to divide the net income of the business remaining, after the above purposes had been answered, amongst the creditors of Messrs. Smith, in rateable proportions,*—provided that in distributing such income, it should be

deemed the property of Messrs. Smith; with power for the majority in value of the joint creditors, at a meeting, to alter the trusts, and make rules as to the discontinuance of the business and the management of it, and ultimately after paying the debts incurred in the business so carried on, to divide the residue of the moneys, rateably, amongst the creditors, with the same provision that the moneys were to be considered the property of Messrs. Smith. The creditors were to receive the provisions of the deed in full discharge of their debts, and they covenanted not to sue. The defendants were creditors of Messrs. Smith, and they subscribed and executed this deed. The trustees carried on the business in pursuance of the deed, under the name of the Stanton Iron Company, and the plaintiff having supplied the company with iron ore, one of the trustees accepted bills of exchange in the name of the company for the price of it. The bills not having been paid at maturity, the plaintiff sued the defendants as acceptors. The real question was whether the deed made the defendants partners with the trustees, or what is the same thing, agents to bind them by their acceptances on account of the business, and the lords present (Lords Campbell, C., Brougham, Cranworth, Wensleydale, and Chelmsford) unanimously held that such agency was not

established by the deed and that the defendants were not liable. "It is often," observed Lord Cranworth, "said, that the tests, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled *to participate in the profits*. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, *that the trade has been carried on by persons acting on his behalf*. When that is the case, he is liable to the trade obligations, and entitled to the profits or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing that entitles him to the one, makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors." His lordship then proceeded to show that *Waugh v. Carver*, *Bond v. Pittard*, *supra*, and *Barry v. Nesham*, 3 C. B. 641, applying to them the test enunciated by him, were correctly decided. "The law," said Lord Wensleydale, "as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view. A man who orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry

on a trade and share the profits, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim, that *he who takes the profits ought to bear the loss*, often stated in the earlier cases on this subject,—*Waugh v. Carver, &c.*,—is only the *consequence*, not the cause, why a man is made liable as a partner. Can we collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed, *constitutes them his agent for carrying on the business for his account* and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade; for if it is profitable they will get their debts paid; but this is not that sharing of profits which constitutes the relation of principal, agent, and partner." See further *Kilshaw v. Jukes*, 3 B. & S. 847; and *Bullen v. Sharp*, Cam. Scac., 1 Law Rep.

C. P. 86; 35 L. J. C. P. 105, *post*, p. 861, in which the above *rationes decidendi* were acted upon.]

On the above principles it is that a *dormant partner*, *i. e.*, a partner whose name does not appear to the world as part of the firm, is held responsible for its engagements, even to those who, when they contracted with the firm, were ignorant of his existence. *Exp. Gellar*, Rose, 297; *Wintle v. Crowther* 1 C. & P. 316; 1 Tyrw. 210; *Robinson v. Wilkinson*, 3 Price, 538; [*Bottomley v. Nuttall*, 5 C. B. N. S. 122; *per* Blackburn, J., *Kilshaw v. Jukes*, 3 B. & S. 847]. In one respect, however, there exists very considerable difference between the liabilities of an *ostensible* partner and those of a *dormant* one; for the liability of a partner who has appeared in the firm, in respect of the acts and contracts of his copartners, continues even after the dissolution of the partnership, and the removal of his name therefrom, until *due notice* has been given of such dissolution. See *Parkin v. Carruthers*, 3 Esp. 248; *Graham v. Hope*, Peake, 154. And, though, as far as the public at large are concerned, notice in the *Gazette* is held sufficient for this purpose, *Godfrey v. Turnbull*, 1 Esp. 371; *Wrightson v. Pullan*, 1 Stark. 375; *Brodie v. Howard*, 17 C. B. 123, yet, to persons who have dealt with the firm, more specific information must be given. *Kirwan v. Kir-*

wan, 4 Tyrw. 491. And this is generally effected by circulars. See *Newsome v. Coles*, 2 Camp. 617; *Jenkins v. Blizard*, 1 Stark. 418. But if a fair presumption of actual notice can be raised from other circumstances, that will be sufficient. *M'Iver v. Humble*, 16 East, 169. Thus, a change in the wording of cheques has been held notice to a party using them. *Barfoot v. Goodhall*, 3 Camp. 147. But it is not to be taken as a legal incident of the position of a *dormant* partner, but rather as a probability arising from the greater likelihood of his share in the firm being unknown to those who deal with it, that his liability ceases upon the actual dissolution of the partnership, whilst that of an *ostensible* partner continues, towards persons who have no notice of the dissolution; for although, generally speaking, a *dormant* partner may retire without giving notice to the world, *Heath v. Sansom*, 4 B. & Ad. 172; yet, even such a partner remains liable to persons who became aware of his partnership whilst it lasted, and continued their dealings with the firm under the belief that he still remained a member of it. If such persons were not made aware of the dissolution, it might be inferred that they dealt on the faith of the partnership; and, as to them, unless the circumstances of the case rebutted such an inference, even a dormant partner would still be liable. *Evans v. Drummond*,

4 Esp. 89, Lord Kenyon; *Carter v. Whalley*, 1 B. & Ad. 13, per Littledale and Parke, JJ.; *Farrar v. Deftinne*, 1 Car. & K. 580, Cresswell, J.

[The above case of *Cox v. Hickman* was soon followed by a statute effecting a further subversion of the principle laid down in *Waugh v. Carver*. By that statute, 28 & 29 Vict. c. 86, s. 1, "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such." Before setting forth the 2nd section, it will be better to state the effect of the law before the act was passed. The participation in profits which was held to constitute a partnership was, that of a person having a right to a share of the profits and to an account in order to ascertain his share, *not that of a mere servant or agent receiving, in respect of his wages, a sum proportioned to a share of the profits, or which might be partly furnished out of the profits*. The distinctions on this subject ran very fine, and in previous editions

of this work, the principal cases were reviewed at some length, in the endeavour to classify them. It will be sufficient now to state the result of the principal cases, which seems to have been,] that whenever it appeared that the agreement *was intended by the parties themselves as one of agency or service*, but the agent or servant [was] to be remunerated by a *portion of the profits*, then the contract [was] considered *as between themselves* one of *agency* (see *Geddes v. Wallace*, 2 Bligh. 270, *R. v. Hartley*, Russ. & R. 139), but, as between them and third persons, one of *partnership*. See *Smith v. Watson*, 2 B. & C. 407; *Ex parte Rowlandson*, 1 Rose, 91; *Green v. Beesley*, 2 Bing. N. C. 110; *Ex parte Langdale*, 18 Ves. 300; [*Wheatcroft v. Hickman*, *supra*]. But that if the agent or servant [was] to be remunerated, not by a portion of the profits, but, as in *Dry v. Boswell*, 1 Camp. 329, *Dixon v. Cooper*, 3 Wils. 40, and *Wilkinson v. Frasier*, 4 Esp. 182, by part of a gross fund or stock which [was] not altogether composed of the profits, the contract, *even as against third persons*, [would have been] one of [ordinary] *agency*, although that fund or stock [might] include the profits, so that its value, and the *quantum* of the agent's reward, [would] necessarily fluctuate with their fluctuation. There was a third case, that, *viz.*, in which the agent or servant was not to receive

a part of the profits *in specie*, but a sum of money calculated in proportion to a given *quantum* of the profits. In such a case Lord Eldon expressed his opinion, that the agent so remunerated would *not* be a partner, even as to third persons. "It is clearly settled," said his lordship, in *Ex parte Humper*, 17 Ves. 112, "though I regret it, that if a man stipulates that he shall have as the reward of his labour, not a specific interest in the business, but a given sum of money, *even in proportion to a given quantum of the profits*, that will not make him a partner; but if he agrees for a part of the profits *as such*, giving him a right to an account, though having no property in the capital, he is *as to third persons* a partner." In another part of the same case he says—"The cases have gone to this nicety, upon a distinction so thin that I cannot state it as established upon due consideration, that if a trader agree to pay another person, for his labour in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner. But if he has a specific interest in the profits themselves he is a partner." 17 Ves. 404. See *Ex parte Watson*, 19 Ves. 461; [*Harrington v. Churchward*, 29 L. J. Cha. 521; and *Lyon v. Knowles*, 3 B. & S. 556; 32 L. J. Q. B. 74, S. C. To sweep away these distinctions was passed the 2nd section of the act above

alluded to. Its terms are the following: "No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner." By the 3rd section, "No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader." This section meets the case put by the Lord Chief Justice in the leading case, p. 850. The 4th section enacts, that "No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business." In relation to this section, see *Rawlinson v. Clarke*, 15 M. & W. 292; and *Barry v. Nesham*, 3 C. B. 641, a case to which it should seem this section would not apply. That case was recognised in *Wheatcroft v. Hickman*, *supra*. The words of section 5 are: "In the event of any such trader as aforesaid being adjudged

a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied. By section 6, the word "person" as used in the act, is made to include a partnership firm, a joint stock company, and a corporation.]

With respect to *nominal partnership*:—that takes place where a person, having *no* real interest in the concern, allows his name to be held out to the world as that of a partner, in which case the law imposes on him the responsibility of one to persons who have had dealings with the firm of which he has held himself out as a member. (See the judgment of the Lord Chief Justice in the principal case; and *Guidon v. Robson*, 2 Camp. 302.) It has, as we have seen, been laid down in *Young v. Axtell*, cited in the text, that it makes no difference in such a person's liability that the party seeking to charge him did

not know at the time when he gave credit to the firm that he had so held himself out. But this position appears very questionable; for the rule which imposes on a *nominal* partner the responsibilities of a *real* one is framed in order to prevent those persons from being defrauded or deceived who may deal with the firm of which he holds himself out as a member, on the faith of his apparent responsibility. But where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies, and there is not wanting authority opposed to such an extension of the rule respecting a nominal partner's liability. "If it could be proved," says Parke, J., "that the defendant held himself out—not to the world, for that is a loose expression—but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable." *Dickenson v. Valpy*, 10 B. & C. 140. So too in *Shott v. Streatfield*, 1 M. & Rob. 9, where the question was, whether Green was liable jointly with Streatfield, a witness proved that he had been told in Green's presence that Green had become a partner. He was then asked whether he had repeated the information, on which Campbell objected that this was not evidence, unless it were shown that

the defendants, or one of them, were present when it was repeated; *sed* per Lord Tenterden, C. J., "I think it is; because otherwise it will be said presently, that what was said was confined to the witness, and that the plaintiff could not have acted on it." In *Alderson v. Popes*, 1 Camp. 404, n., it was held, that a man could not be charged as a partner by one who, when he contracted, had notice that he was but nominally so. The reason of this must have been, because he could not have been deceived, or induced to deal with the firm, by any reliance on the nominal partner's apparent responsibility. And the same reason precisely applies, whether the false impression on the customer's mind have been put an end to by a notice, or whether, in consequence of his ignorance that the nominal partner's name has been used, no false impression ever existed on his mind at all. (See *Carter v. Whalley*, 1 B. & Ad. 11; *Ford v. Whitmarch*, Exch. Mich. 1841; 1 Hurls. & Walm. 53; *Pott v. Eyton*, 3 C. B. 32; [*Edmundson v. Thompson*, 31 L. J. Exch. 207; *Stephens v. Reynolds*, 2 Fost. & Fin. 147.]) However, in order to fix a person with this description of liability, no particular mode of holding himself out is requisite. If he do acts, no matter of what kind, sufficient to induce others to believe him a partner, he will be liable as such. See *Spencer v.*

Billing, 3 Camp. 310; *Parker v. Barker*, 1 B. & B. 9; 3 Moore, 226; [*Gurney v. Evans*, 3 H. & N. 122.] But a man who describes himself as a partner with another in one particular business does not thereby hold himself out as such in any other business which that other may happen to profess. *Re Berkum v. Smith*, 1 Esp. 29; *Bidgway v. Philip*, 5 Tyrw. 131. Nor is a person liable as a nominal partner, because others, without his consent, use his name as that of a member of their firm, even although he may have previously belonged to it, provided he have taken the proper steps to notify his retirement. *Newsome v. Coles*, 2 Camp. 617. Nor, as has been already stated, can a man be charged as a member of the firm by one who had

express notice that he was but nominally so. *Alderson v. Popes*, 1 Camp. 404, *in notis*.

[In one of the most recent cases in which the question of liability because of the receipt of profits was considered, the opinion of the majority of the Court of Exchequer Chamber, reversing a judgment of the Common Pleas, was against the liability of a trustee under a marriage settlement by which the trustee was to receive all the profits of the husband's business of an underwriter, in trust in the first place to pay himself an annuity, for which the husband was liable before the settlement, and afterwards for the objects of the settlement. *Bullen v. Sharp*, 1 Law R. C. P. 86, S. C. 35 L. J. C. P. 105].

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